Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

IN RE: BRUCE YOUNG AND NANCY YOUNG,

Debtors.

JULIA A. CHRISTIANS, TRUSTEE,

Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), this Court reaffirmed the fundamental principle of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that it is the distinctive duty of the Supreme Court – not of Congress – to declare the meaning of the Constitution. In *Flores*, this Court reviewed the Constitutionality of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb1-4 (1992), through which Congress had sought to legislate a substantive alteration in the meaning of the Free Exercise Clause as declared by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Flores* held that RFRA was unconstitutional because RFRA legislatively "alters the meaning of the Free Exercise Clause" and "contradicts vital principles necessary to maintain separation of powers."

The Eighth Circuit, in its first decision of the case at hand, had relied on RFRA to create an exception for churches to a bankruptcy trustee's right to recover from donees, on behalf of creditors, monies given away by insolvent debtors prior to the debtors' filing for bankruptcy. This Court, by its Order dated June 27, 1997, granted the present Petitioner's petition for a writ of certiorari, vacated the judgment of the Eighth Circuit, and remanded the case for further consideration in light of *Flores*.

On remand, the same panel of the Eighth Circuit, by a 2-1 decision, has now held that RFRA does not contradict vital principles necessary to maintain separation of powers, and has purported to limit *Flores* to state law. The panel thus reinstated its first decision.

QUESTIONS PRESENTED – Continued

The Questions that arise from the Eighth Circuit's decision are:

1. Where this Court has directly and clearly ruled that a statute "contradicts vital principles necessary to maintain separation of powers," may a court of appeals decide that the statute does not contradict such principles?

2. Even if *Flores* did not exist, has Congress violated the principle of separation of powers by enacting RFRA, a statute which displaces the Supreme Court's interpretation of the Free Exercise Clause?

3. Does RFRA, as applied to the Bankruptcy Code, 11 U.S.C. § 548(a)(2), violate the Religion Clauses because it compels private creditors to subsidize their bankrupt debtors' churches and establishes a preference solely for religion?

4. By requiring the courts to determine whether governmental action "substantially" burdens a claimant's exercise of religion, does RFRA violate the Establishment Clause because it entangles the judiciary in determining the centrality of a particular belief or practice in a religion or the plausibility of a religious claim?

5. RFRA provides that "Government shall not substantially burden a person's exercise of religion," unless the governmental action furthers a "compelling governmental interest" by the "least restrictive means." Assuming that RFRA is constitutional: (a) does recovery of

QUESTIONS PRESENTED – Continued

legitimately owed debt in bankruptcy proceedings constitute a "substantial burden" on the debtor's already-completed exercise of religion; and, (b) does the Bankruptcy Code further a compelling governmental interest by the least restrictive means?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated April 13, 1998, reinstating its previous decision and again reversing the decision of the District Court, is reported at ___ F.3d ___, 1998 WL 166642, and is reprinted in the Appendix, *infra*, at A1-A28. The Order of the Supreme Court of the United States of America dated June 27, 1997, granting the Petitioner's petition for a writ of certiorari, vacating the judgment, and remanding the case to United States Court of Appeals for the Eighth Circuit for further consideration in light of *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), is reported at 117 S. Ct. 2502 (1997) and is reprinted in the Appendix at A29. The opinion of the Court of Appeals dated May 6, 1996, reversing the decisions of the District Court and the Bankruptcy Court, is reported at 82 F.3d 1407 (8th Cir. 1996), and is reprinted in the Appendix at A30-A67. The decision of the Court of Appeals dated June 27, 1996, denying the suggestion for rehearing en banc (and petition for rehearing) is reported at 89 F.3d 494 (8th Cir. 1996) and is reprinted in the Appendix at A68-A71. The decision of the District Court dated April 14, 1993, affirming the judgment of the Bankruptcy Court, is reported at 152 B.R. 939 (D. Minn. 1993), and is reprinted in the Appendix at A72-A103. The decision of the Bankruptcy Court dated December 17, 1992, granting summary judgment in favor of Petitioner, is reported at 148 B.R. 886 (Bankr. D. Minn. 1992), and is reprinted in the Appendix at A104-A128.

BASIS FOR JURISDICTION

The Court of Appeals entered its order on April 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Establishment and Free Exercise Clauses, First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The Bankruptcy and Necessary and Proper Clauses, Article I, § 8, United States Constitution

> The Congress shall have Power . . .
>
> > To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . .
> >
> > To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb1-4 (1993)

> The full text of The Religious Freedom Restoration Act ("RFRA") is reprinted in the Appendix (A129-A132).

The Bankruptcy Code of 1978, 11 U.S.C. §§ 548(a)(2) and 548(d)(2)(A)

> The full text of §§ 548(a)(2) and 548(d)(2)(A) is reprinted in the Appendix (A133-A134).

STATEMENT OF THE CASE

This case involves a bankruptcy trustee's efforts to recover, on behalf of creditors, $13,450.00 given by the insolvent debtors to their church prior to the debtors' filing for bankruptcy. Both the bankruptcy court and the district court held that the trustee was entitled to recover the gifts from the church pursuant to 11 U.S.C. § 548(a)(2)(A). The bankruptcy court's jurisdiction was based on 28 U.S.C. §§ 1134 and 157(a) and Local Rule 201. The bankruptcy court and district court opinions are reprinted in the Appendix hereto at A104-A128 and A72-A103, respectively.

In its first decision of this case, the court of appeals on May 6, 1996, reversed the order of the district court by a two-to-one decision. *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), reproduced in the Appendix at A30-A67. The court unanimously held, first, that the debtors' gifts to their church fit within the definition of avoidable transfers and were therefore recoverable by the trustee under § 548(a)(2).

The majority then turned to the effect of RFRA on this case. In RFRA, Congress expressly found that "governments should not substantially burden religious exercise without compelling justification," and that this Court's decision in *Smith* "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion." Given Congress' expressed unhappiness with *Smith*, the stated purpose of RFRA was to "restore the compelling interest test [for Free Exercise claims] as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."

The operative section of RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "application of the burden to the person" is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."

The majority of the Eighth Circuit panel stated that "[t]he threshold inquiry under the RFRA is whether the governmental action in question 'substantially burdens' a person's religious practice." Although quoting the rule in *Smith* that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim," the majority held that "[f]or purposes of analysis, we can assume that the recovery of these contributions would substantially burden the debtors' free exercise of religion."

The majority then addressed the question of whether there is a compelling governmental interest in the Bankruptcy Code in general and § 548(a)(2) in particular because they allow debtors to get a fresh start while at the same time protect the interests of creditors. Observing that "[t]he bankruptcy cases decided under the RFRA are split," the majority held that "the interests advanced by the bankruptcy system are not compelling under the RFRA." The majority thus held that RFRA provides a defense against the order of the district court permitting the Trustee to avoid the Debtors' contributions to the Church under § 548(a)(2).

In dissent, Judge Bogue reasoned that the trustee's recovery of money from the church (not from the debtors) could not have "substantially burdened" the debtors'

exercise of religion, because the debtors had already completed their religious act of donating money to the church. The dissent further agreed with those courts that have held that the Bankruptcy Code and § 548(a)(2) further a compelling governmental interest in protecting the legitimate interests of creditors and do so in the least restrictive means.

After her petition to the court of appeals for rehearing and rehearing *en banc* was denied, the trustee petitioned this Court for a writ of certiorari. By its Order dated June 27, 1997, this Court granted the trustee's petition, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of *Flores*. *Flores* had held that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Flores*, 117 S. Ct. at 2172.

On rehearing, the same panel of the court of appeals, by a two-to-one decision, held that RFRA did not violate the principle of separation of powers. *See* Appendix at A9-A14. The majority further decided that "[t]he *Flores* Court did not reach any decision as to the constitutionality of RFRA as applied to federal law." *Id.* at A7. Finally, the majority held that RFRA did not violate the Establishment Clause. *Id.* at A14-A19.

The dissent stated that RFRA is unconstitutional as applied to federal law. Noting that "[o]ur instruction on the remand from the Supreme Court is to conduct further proceedings ***in light of*** *City of Boerne v. Flores*" (emphasis in original), the dissent observed that *Flores* "does more than merely declare RFRA unconstitutional as applied to state law. In broad terms, *Flores* dictates that, despite the broadest reach of Congress' plenary powers, there is a

point beyond which Congress may not go in the exercise of its power without intruding upon the core function of the judicial branch, thereby offending 'vital principles necessary to maintain separation of powers. . . . ' This rationale of *Flores* applies to federal law, as well as state law." *Id.* at A20 (citing *Flores*, 117 S. Ct. at 2172).

The court of appeals having reinstated its earlier decision in this matter, the trustee now asks this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

I. IN THE FACE OF THIS COURT'S ORDER TO RECONSIDER IN LIGHT OF *FLORES*, THE EIGHTH CIRCUIT'S DECISION REPUDIATES THE HOLDING OF *FLORES* THAT RFRA VIOLATES THE SEPARATION OF POWERS.

Flores holds that RFRA contradicts the separation of powers. The court of appeals holds that RFRA does not.

By repudiating this Court's decision in *Flores*, the decision of the court of appeals repudiates not only *Flores* itself, but the authority of this Court to declare the law. *Flores* is a significant decision upholding both the balance of powers between the federal and state governments, and the separation of powers between the Judicial and the Legislative Branches of government. If allowed to stand, the decision of the court of appeals would nullify fully half of *Flores'* reaffirmation of the fundamental structure of government under the Constitution. This Court must not permit its own authority to be so diminished.

"A direct conflict between the decision of the court of appeals of which review is being sought and a decision of

the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari." Robert Stern, Eugene Gressman, Stephen Shapiro, Kenneth Geller, *Supreme Court Practice* § 4.5 at p. 174 (7th ed. 1993).

Here, the conflict is direct and clear. In *Flores*, this Court expressly held that "RFRA contradicts vital principles necessary to maintain separation of powers. . . . " *Flores*, 117 S. Ct. at 2172. Nor was this an isolated statement. Indeed, the final passage of the *Flores* opinion is devoted entirely to a plain-spoken statement of the importance of the separation of powers in the Constitutional framework:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.

Id.

As a violation of "vital principles necessary to maintain separation of powers," RFRA is invalid as to all law, both State and Federal. The Supreme Court is "the branch whose distinctive duty it is to declare 'what the law is,' *Marbury v. Madison*, 1 Cranch, at 177." *United States v.*

Lopez, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring). Congress cannot invade this "distinctive duty" for either State or Federal law.

Yet the majority opinion of the court of appeals held that RFRA did not contradict separation of powers concerning Federal law. Such a holding cannot be squared with the holding of *Flores* that "RFRA contradicts vital principles necessary to maintain separation of powers."

The duty of a court of appeals is to follow the decisions of the Supreme Court. The court of appeals did not do so here, choosing instead to repudiate this Court's holding in *Flores* that RFRA violated the separation of powers. Perhaps the court of appeals made its choice because it wishes that this Court had adopted RFRA's interpretation of the Free Exercise Clause instead of the standard of review exemplified by *Smith*. Under the ordered system of government constructed by the Constitution, however, the lower courts cannot be left at liberty to reject this Court's binding declaration of the meaning of the Constitution in favor of a contrary Congressional interpretation, especially when this Court has held that the statute embodying the contrary Congressional interpretation unconstitutionally invades the province of the Supreme Court.

Because the court of appeals has attempted to repudiate the authority of this Court in *Flores*, this Court should grant the requested writ of certiorari and summarily reverse the decision of the court of appeals. *See, e.g., Rhodes v. Stewart*, 488 U.S. 1 (1988) (summarily reversing where a court of appeals misapprehended controlling Supreme Court precedent); *see also* Robert Stern, Eugene Gressman, Stephen Shapiro, Kenneth Geller, *Supreme Court Practice* § 4.5 at p. 174 (7th ed. 1993).

II. EVEN IF *FLORES* DID NOT EXIST, THE EIGHTH CIRCUIT'S DECISION UPHOLDING RFRA CONFLICTS WITH THIS COURT'S SEPARATION OF POWERS DOCTRINE.

In 1990, this Court set forth the rule that laws that burden a person's exercise of religion nevertheless do not violate the Free Exercise Clause if the laws are neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). Religious groups, civil libertarians, academics, and Congress immediately criticized *Smith* as expressing an unacceptably weak definition of the Free Exercise Clause's protection of religion. *See generally* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 66-67 (1996).

Congress swiftly reacted to *Smith* by enacting RFRA. *Id.* In its findings and declaration of purposes, Congress makes clear that RFRA was intended to displace this Court's *Smith* decision and to "restore," and "guarantee its application in all cases where free exercise of religion is substantially burdened," an interpretation of the Free Exercise Clause perceived to give greater protection to religion; namely, the "compelling state interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. *See Flores*, 117 S. Ct. at 2160, 2171.

In setting a higher standard of protection for Free Exercise claimants than that set by this Court, RFRA necessarily displaces this Court's interpretation of the Free Exercise Clause. Under RFRA, if a challenged statute does not meet the high standard of Free Exercise protection defined by RFRA, the Free Exercise claimant is not subject to the statute, regardless of whether the statute is

constitutional under this Court's less restrictive interpretation of the Free Exercise Clause as set forth in *Smith*. Conversely, if the challenged statute does meet RFRA's test, it ordinarily automatically more-than-meets this Court's interpretation of the Free Exercise Clause.[1] In short, RFRA makes Congress the supreme interpreter of the Free Exercise Clause, and renders this Court's interpretation irrelevant. *See, e.g., Estep v. Dent*, 914 F. Supp. 1462, 1466 (W.D. Ky. 1996) ("RFRA ensures that all claims of free exercise of religion are governed by the compelling interest standard rather than the lower reasonableness standard.").

Congress, however, does not have the power to impose its interpretation of the Free Exercise Clause upon the nation, no matter how urgent Congress believes the need to reverse this Court's rule in *Smith*. "The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992).

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[1] Theoretically, it would be possible for a federal statute to pass muster under RFRA but still violate the Free Exercise Clause as interpreted in *Smith*. In the unlikely situation that a federal statute furthered a compelling governmental interest or did not substantially burden a person's exercise of religion, but nevertheless targeted only conduct motivated by religious belief, the statute could pass muster under RFRA but violate the Free Exercise Clause. *See generally, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Thus, hypothetically, RFRA does not completely eliminate the role of the Free Exercise Clause, but instead leaves the Clause with a trivial, at best highly marginalized, function.

The power to interpret the Free Exercise Clause is the power of this Court, not of Congress. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("This [*Marbury*] decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

"It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)). In RFRA, however, Congress intrudes upon this Court's province and duty to interpret the Free Exercise Clause. It does so by rendering this Court's interpretation of the Clause an irrelevant appendage and by imposing upon all courts, including this Court, Congress' view of the proper interpretation of the Free Exercise Clause. As stated by one of RFRA's authors, and the Church's counsel in this case, RFRA was "designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 254 (1994). RFRA therefore usurps this Court's authority to interpret the Constitution, and violates the principle of separation of powers.

Nothing in the Constitution grants Congress the power to legislate the standard of protection for Free

Exercise claimants. The First Amendment does not contain any grant of power to Congress to enforce its provisions.

The majority of the Eighth Circuit panel concluded that, as applied to federal laws, RFRA finds its Constitutional underpinning in the Constitutional authority for the very federal laws to which RFRA would apply. *See* Appendix at A9-A14. In other words, "RFRA calls on us to assume that it effectively, and without any legislative discussion, amends every statute in the United States Code. . . . The constitutionality of RFRA, in the federal sector, is thus supported by this argument: If Congress has the necessary and proper power to enact a bankruptcy or a banking law, then it necessarily has the necessary and proper power to tack onto that law the judicial balancing approach of RFRA." Gressman & Carmella, *supra*, at 137.

If RFRA is deemed an exercise of the enumerated Congressional powers under Article I, § 8, of the Constitution, however, then Congress had authority to enact RFRA only if RFRA passes muster under the Necessary and Proper Clause. *See* Const., Art. I, § 8, Cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As Chief Justice Marshall held in *McCulloch*, the standard governing whether legislation is "necessary and proper" is a three-part test: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 321.

The "end" or purpose of RFRA is undeniably a sweeping redefinition of an individual's rights of Free Exercise under the First Amendment. *See Flores*, 117 S. Ct. at 2164, 2170 (RFRA is "legislation which alters the meaning of the Free Exercise Clause"; RFRA "attempted a substantive change in constitutional protections"). This is not a legitimate Article I purpose. As stated by Professors Gressman and Carmella:

> [I]t is impossible to find legitimacy in RFRA's overweening "end" or "purpose," openly proclaimed in Section 2(b)(2), "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened." Add the repeated statements of RFRA's framers and sponsors that the real purpose of the Act is to overturn the Supreme Court's decisions in *Smith* and *O'Lone*, and we are forced to conclude that Congress simply cannot act with such "ends" in mind. **It is the height of illegitimacy for Congress to seek to control the judicial standards used in treating free exercise cases and controversies, to mandate or correct a judicial interpretation of the Free Exercise Clause, or to induce the judiciary to ignore if not overrule Supreme Court decisions. There is no provision in the Constitution that empowers Congress to legislate such "ends."**

Gressman & Carmella, *supra*, at 133-34 (emphasis supplied).

To paraphrase *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997), "[w]hen a law . . . for carrying into execution the [Bankruptcy Clause] violates the principle of [separation of powers] . . . it is not a law . . . proper for carrying into execution of the [Bankruptcy Clause], and is thus, in the words of the Federalist, 'merely an act of usurpation'

which deserves to be treated as such." (internal quotations and citations omitted).

RFRA also fails the *McCulloch* test because it is not consistent "with the letter and spirit of the constitution." *McCulloch, supra*. RFRA is, in the words of one of its main proponents, "a replacement for the Free Exercise Clause." Laycock and Thomas, *supra*, at 219. Yet Congress did not follow the procedure required by Article V of the Constitution for replacing or amending the Free Exercise Clause. Instead, Congress invaded the exclusive province of the judicial branch to say what the law is. RFRA is therefore unconstitutional. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

As shown by the Congressional findings, 42 U.S.C. § 2000bb(a), Congress in enacting RFRA was not acting as "a political organ well-suited to conduct the business of empirical research and policy implementation" for the bankruptcy laws and the other Article I concerns allocated by the Constitution to Congress. *Hamilton v. Schriro*, 74 F.3d 1545, 1566 (8th Cir. 1996) (McMillian, J., dissenting in part), *cert. denied*, 117 S. Ct. 193 (1996). Instead, the language of the Congressional findings

> portrays Congress . . . as a super-Supreme Court. . . . In essence, [through RFRA] Congress has instructed the Supreme Court how to interpret the Free Exercise Clause of the First Amendment (that is, apply the compelling interest test), even though the Court, the entity charged by the Constitution with its application, has determined that the compelling interest test is neither feasible nor required. It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to

> the delicate balance of the separation of powers. . . .
>
> Were we to uphold RFRA . . . , we would, under our reading of *Smith*, allow Congress to impose a standard for the judicial evaluation of all free exercise claims which not only overrules prior free exercise decisions but also, in the considered and paramount judgment of the Supreme Court, leads to constitutionally anomalous results. Where, as here, Congress acts . . . to impose on the judiciary a method of analysis for the resolution of all claims based on the fundamental right of free exercise, which in the Court's view, does not produce "equality of treatment" but constitutional anomalies, such legislative action, I think, must be beyond the language and . . . intent [of the Constitution].

Hamilton, 74 F.3d at 1566, 68 (McMillian, J., dissenting in part).[2] As a violation of the principle of separation of powers, RFRA cannot be considered a "necessary and proper" application of Congress' Article I, § 8 bankruptcy power. Accordingly, Congress lacked the constitutional power to enact RFRA for application to either federal or state law.

Numerous courts both before and after *Flores* have ruled on the issue of whether RFRA violated the

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[2] Ironically and inexplicably, Judge McMillian was one of the two judges in the majority of the panel in the case at hand. Although Judge McMillian's dissent in *Hamilton v. Schriro* involved the application of RFRA to a state law, his reasoning applies equally to federal law.

principle of separation of powers in the federal sphere.[3] Scholars have exhaustively debated the

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[3] *Compare Christians v. Crystal Evangelical Free Church*, ___ F.3d ___, ___ (8th Cir. Apr. 13, 1998) (Bogue, J., dissenting) (RFRA violates separation of powers); *In re Saunders*, 214 B.R. 524, 526 (Bankr. D. Mass. 1997) ("The [Bankruptcy] Trustee's argument against RFRA has been upheld by the highest court of the land"); *Geltzer v. Crossroads Tabernacle*, 214 B.R. 101, 102 n.1 (Bankr. S.D.N.Y. 1997) (holding in a bankruptcy trustee's action to recover tithes made to a church that the Supreme Court had held RFRA unconstitutional in *Flores*); *In re Adrade*, 213 B.R. 765 (Bankr. E.D. Cal. 1997) (holding in a bankruptcy trustee's action to recover tithes made to a church that the Supreme Court had held RFRA unconstitutional; "[o]bviously, Debtors may not rely upon the Act now"); *In re Hodge*, 200 B.R. 884 (Bankr. D. Idaho 1996) (RFRA violates the separation of powers as applied to the Bankruptcy Code); *with Christians v. Crystal Evangelical Free Church*, ___ F.3d ___ (8th Cir. Apr. 13, 1998) (RFRA violates separation of powers as to state law, but not as to federal law); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (RFRA does not violate separation of powers), *cert. granted, judgment vacated, and remanded*, 117 S. Ct. 2502 (1997); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996) (pre-*Flores* case holding that RFRA does not violate separation of powers); *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge)*, ___ B.R. ___, 1998 WL 173065 (D. Idaho April 3, 1998) (RFRA is constitutional as applied to the Bankrtupcy Code); *In re Saunders*, 215 B.R. 800 (D. Mass. 1997) (stating that "[t]he constitutional issues involved in the application of RFRA to the Bankruptcy Code remain open after Flores," but holding that RFRA is unconstitutional as applied to the Bankruptcy Code because RFRA violates the Religion Clauses). After *Flores*, those courts asked to apply RFRA to state law have generally ruled that *Flores* held RFRA unconstitutional, without limiting their rulings to saying that RFRA is unconstitutional as to state law only. *See, e.g., Shabazz v. Parsons*, 127 F.3d 1246 (10th Cir. 1997); *Muhammad v. City of New York Department of Corrections*, 126 F.3d 119, 121 (2d Cir. 1997); *Anderson v. Angelone*, 123 F.3d 1197, 1198 n.2 (9th Cir. 1997); *cf. Montano v. Hedgepeth*, 120 F.3d 844, 847 n.8

issue.[4] The issue is absolutely vital to the checks and

(8th Cir. 1997) (the "Supreme Court held that RFRA represents an unconstitutional extension of Congress' legislative authority under Section Five of the Fourteenth Amendment").

[4] *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont. L. Rev. 5 (1995) (arguing RFRA is unconstitutional because it violates the separation of powers doctrine); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) (arguing RFRA is unconstitutional because it violates the doctrine of incorporation and is inconsistent with the framers' intent that the first amendment be a disability applicable to Congress); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995) (discussing how RFRA circumvents the process of constitutional amendment); Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 Chapman Univ. Nexus Journal of Opinion 73 (1997) (arguing RFRA as applied to federal law fails all three prongs of the *McCulloch* test); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 131 (1996) (arguing that RFRA violates separation of powers doctrine); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357 (1994) (arguing that RFRA is unconstitutional as a violation of the doctrine of enumerated powers); *but see* Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U.L. Rev. 73 (supporting RFRA as clarification of free exercise jurisprudence, and claiming broad Section 5 legislative power); Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181 (1992) (urging that Congress overturn *Employment Div. v. Smith* under its Section 5 power); Douglas Laycock & Oliver S. Thomas, *Interpreting The Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) (arguing RFRA is constitutional and discussing how courts should enforce RFRA consistent with its

balances that safeguard our form of government and is ready for decision by this Court.

III. THE EIGHTH CIRCUIT'S DECISION UPHOLDING RFRA CONFLICTS WITH THIS COURT'S FREE EXERCISE AND ESTABLISHMENT CLAUSE DOCTRINE

By its decision, the court of appeals compels individuals to give involuntary financial support directly to another person's religion. This is so because under the court's ruling, a bankrupt debtor's creditors must forego their right to repayment of justly owed debts if the debtor has given money to a church in the exercise of the debtor's religion, with the result that the church may keep the money that would otherwise go to the creditors. At the same time, the court of appeals has established a favored class of "religious" donees who, unlike secular donees, are exempted from returning to the bankruptcy trustee, for repayment to an insolvent donor's creditors, the insolvent donor's pre-bankruptcy gifts.

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vision of religious freedom accommodation); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994) (exploring RFRA interpretive issues and encouraging a standard affording broad protection for religious freedom); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996) (arguing that RFRA poses federalism issues but is constitutional as a legislative exercise of Section 5 power); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029 (1993) (suggesting RFRA is well within Congress' Section 5 power).

The court's holding means that, through RFRA, Congress has now compelled involuntary private subsidization of churches – and concomitantly that Congress has granted a special privilege to "religious" donees to be free from generally applicable laws. This raises Free Exercise and Establishment Clause issues of exceptional public importance. Never has this Court allowed the impressment of certain persons for the purpose of subsidizing another person's religious beliefs. As Thomas Jefferson wrote, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 235-36 n.31 (1977) (citing I. Brant, *James Madison: The Nationalist* 354 (1948)).

The holding of the Eighth Circuit that Congress may compel one person to subsidize another person's religious beliefs runs directly contrary to the neutrality that the Establishment Clause demands from Congress in matters respecting religion. The Eighth Circuit's holding conflicts irreconcilably both with the long-standing rule of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and with this Court's most recent Establishment Clause jurisprudence.

Pursuant to *Lemon v. Kurtzman*, a statute such as RFRA does not violate the Establishment Clause if it: (1) has a secular purpose; (2) does not have the primary or principal effect of advancing religion; and (3) does not foster an excessive entanglement with religion. *Lemon*, 430 U.S. at 612-13. A statute is unconstitutional if it fails any one or more of the three parts of the *Lemon* test. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). RFRA fails all three parts.

It cannot seriously be contended that RFRA has a secular purpose. As set forth in the Congressional findings and declaration of purposes, RFRA is overtly intended to heighten the protection afforded to religious exercise beyond the protection afforded by the Supreme Court's reading of the Free Exercise Clause in *Employment Div. v. Smith*, 494 U.S. 872 (1990). The Congressional findings ("governments should not substantially burden religion without compelling justification") and declaration of purposes ("to provide a claim or defense to persons whose religious exercise is substantially burdened by government") are a pure endorsement of the exercise of religion. *See* 42 U.S.C. § 2000bb (a) and (b).

The majority of the panel in the present case concluded that RFRA has a secular purpose of advancing religion, like the statute at issue in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). But the statute addressed in *Amos* was dispositively different from RFRA in two regards.

In *Amos*, this Court rejected an Establishment Clause attack on § 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, which exempts religious institutions from Congress' prohibition of religious discrimination in employment. Unlike RFRA, the exemption was made for the secular purpose of avoiding entanglement between church and state. This Court held that by protecting religious institutions from governmental scrutiny for religious discrimination, § 702 "effectuates a more complete separation of the two and avoids . . . intrusive [judicial] inquiry into religious belief. . . . " *Amos*, 483 U.S. at 339. By contrast, RFRA expressly requires judicial inquiry into religious belief by requiring that courts determine the

validity of a claim that a law "substantially" burdens the claimant's exercise of religion.

Moreover, the statute at issue in *Amos* was a limited, Congressionally determined exemption. RFRA, by contrast, is potentially unlimited in its scope, and its scope is not defined by Congress but by the Courts. Congress declared an exemption for churches from Title VII in the statute upheld by *Amos*. But in RFRA, Congress has not declared that any religious adherent does, or does not, have an exemption from any statute that might be named. Rather, Congress has left it to the courts to decide in individual cases whether an exemption should be granted. This is impermissible under the First Amendment:

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that . . . the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system . . . in which judges weigh the social importance of all laws against the centrality of religious beliefs.

Smith, 494 U.S. at 890.

Likewise, RFRA plainly has the primary or principal effect of advancing religion, because it protects a "person's exercise of religion" and protects nothing else except religious exercise. *See* 42 U.S.C. § 2000bb-1. Under *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987), a law has forbidden "effects" if it connotes "sponsorship" or "financial support" of religion. RFRA has precisely such forbidden effects. In the present case,

for example, RFRA provides financial support and sponsorship to religion by providing that churches and other recipients of religiously motivated gifts may keep money that is given to them by bankrupt debtors, but donees of secular gifts may not. *See Flores*, 117 S. Ct. at 2172 (Stevens, J., concurring).

RFRA, as applied in the present case, compels creditors to forego repayment of debt so that their debtors' religious practices may receive financial support. Thus RFRA squarely violates Jefferson's admonition against "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves." *Abood*, 431 U.S. at 235-36 n.31. By doing so, RFRA not only violates the Establishment Clause, but the Free Exercise Clause as well. *See In re Saunders*, 215 B.R. 800 (D. Mass. 1997); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 339 (1996) ("Coercing citizens to support a religion in which they do not believe will often, and arguably always, violate the Free Exercise Clause").

Finally, RFRA unquestionably fosters an excessive entanglement with religion. By providing that "[g]overnment shall not substantially burden a person's exercise of religion," RFRA requires that the courts first must determine what is, and is not, a substantial burden upon a person's exercise of religion. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Widmar v. Vincent*, 454 U.S. 263, 269-70, n.6 (1981) ("Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases"); *Hamilton v. Schriro*, 74 F.3d 1545, 1567 (8th

Cir. 1996) (McMillian, J., dissenting in part) (RFRA impermissibly requires courts to "weigh the extent of an alleged infringement upon a religious practice against the importance of that practice"), *cert. denied*, 117 S. Ct. 193 (1996); *Smith v. Fair Employment and Housing Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring) (RFRA is unconstitutional because it requires courts to inquire into the substantiality of an alleged burden on religious exercise), *cert. denied*, 117 S. Ct. 2531 (1997).

This Court's most recent Establishment Clause cases confirm the result compelled by *Lemon*. In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 838-39 (1995), the Court echoed the *Lemon* test in holding:

> If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation.

This Court emphasized in *Rosenberger* that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger*, 515 U.S. at 839. RFRA plainly is not neutral towards religion; it blatantly favors religion. It extends no benefits or protection to anything except religion.

Unlike the constitutionally acceptable government program in *Rosenberger*, RFRA was "created to advance religion," *id.*, by establishing protection for religion beyond the level of constitutional protection delineated in *Smith*. And unlike the program in *Rosenberger*, RFRA grants financial benefits only to religion. Under the

panel's decision in the present case, for example, RFRA protects those who give their money away prior to bankruptcy only if the gift is part of their "exercise of religion." By contrast, RFRA does nothing to protect secular gifts of money under otherwise identical circumstances. Thus RFRA protects a sectarian gift to the Church, but not an otherwise identical secular gift to the Red Cross.

Further, under the appellate court's decision in the present case, RFRA requires creditors to forego repayment of debt to which they would otherwise be entitled, and thereby levies upon creditors a financial penalty for the direct support of religion, in direct relation to the amount of money the debtor has given away prior to bankruptcy as part of his "exercise of religion." *Rosenberger* makes clear that such financial favoritism for religion violates the Establishment Clause. *See Rosenberger*, 515 U.S. at 840-41.[5]

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[5] As applied in the present case, RFRA not only favors religious giving over non-religious giving, but favors certain religions over other religions. Under the holding of the present case, religions that involve monetary giving as part of an adherent's "exercise of religion" are preferred over religions that do not involve such a requirement. Also, as applied in the present case, RFRA requires that non-adherents forgive debts so that adherents may, *pro tanto*, fund their churches. Certainly it goes beyond "accommodation" for RFRA in the present case to put money into the coffers of certain churches only, while denying others the right to such benefits. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (finding no secular objective for a sales tax exemption because the exemption applied only to religious organizations); *Estate of Thornton*, 472 U.S. at 711 (O'Connor, J., concurring that a statute was unconstitutional because it "single[d] out Sabbath observers for special and . . . absolute protection without according similar accommodation to ethical and religious beliefs and practices of

In *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court "held that the display of a privately-sponsored creche on the 'Grand Staircase' of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not . . . open to all on an equal basis, so the County was favoring sectarian religious expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995). Like the "Grand Staircase," the benefits of RFRA are not open to all on an equal basis. RFRA is open only to those who practice religion. RFRA is "government action [that] . . . discriminate[s] in favor of private religious expression or activity." *Id.* (citing *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994)). RFRA therefore violates the Establishment Clause.

The courts have addressed RFRA's constitutionality under the Establishment Clause, with conflicting results.[6]

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other private employees"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696-708 (1994) (holding that a statute creating a school district comprised entirely of members of the Satmar Hasidic sect violated the Establishment Clause).

[6] *Compare In re Saunders*, 215 B.R. 800 (D. Mass. 1997) (RFRA as applied to the Bankruptcy Code violates both the Free Exercise Clause and the Establishment Clause); *Lawson v. Singletary*, 85 F.3d 502, 505 n.2 (11th Cir. 1996) (strongly suggesting, but not deciding, that RFRA violates the Establishment Clause); *Hamilton v. Schriro*, 74 F.3d 1545, 1567 (8th Cir. 1996) (McMillian, J., dissenting in part) (RFRA is unconstitutional because it entangles the courts in determining the substantiality of an alleged burden on free exercise), *cert. denied*, 117 S. Ct. 193 (1996); *Smith v. Fair Employment and Housing Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring) (same), *cert. denied*, 117 S. Ct. 2531 (1997); *with Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (pre-*Flores* decisions that RFRA does not violate the Establishment Clause),

Likewise, scholarly writing on both sides of the issue is well-developed.[7] RFRA's legislative compulsion of some individuals to subsidize financially the religious practices of another class of individuals runs directly contrary to this Court's Free Exercise and Establishment Clause jurisprudence and threatens the religious freedom of all. The issue is ready for decision by this Court, and the present case offers a set of facts that places the issue in clear relief.

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cert. granted, judgment vacated, and remanded, 117 S. Ct. 2502 (1997); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) (same); *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge)*, ___ B.R. ___, 1998 WL 173065 (D. Idaho April 3, 1998) (following but criticizing appellate precedent which holds that RFRA does not violate the Establishment clause).

[7] *Compare, e.g.*, Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 Ill. L. Rev. 1041 (arguing that it is a violation of Free Exercise to allow a debtor's exercise to diminish the contractual rights of a particular group of private individuals, which diminution is what RFRA accomplishes); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247 (1994) (arguing that RFRA violates the Establishment Clause); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U.L. Rev. 437 (1994) (same); *with* Michael Stokes Paulson, *A RFRA Runs Through It: Religious Freedom And The U.S. Code*, 56 Mont. L. Rev. 249 (1995); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) (arguing that RFRA is constitutional).

IV. IF THIS COURT WERE TO HOLD THAT RFRA MAY BE APPLIED IN THE PRESENT CASE, THEN THIS COURT SHOULD GRANT CERTIORARI TO DECIDE IMPORTANT BUT UNSETTLED QUESTIONS CONCERNING THE "SUBSTANTIAL BURDEN" AND "COMPELLING GOVERNMENTAL INTEREST" TESTS THAT RFRA WOULD IMPOSE.

The present case underscores this Court's determination in *Smith* that the compelling interest test is not workable in cases involving the exercise of religion. RFRA requires evaluation, in the present case, of the merits of the Church's claim that the Debtors' exercise of religion was in fact "burdened" by the Trustee's recovery from the Church (not from the Debtors) of an amount equivalent to the Debtors' earlier tithes, and that this burden was "substantial." The majority of the appellate panel in the present case refused to undertake this evaluation, questioning whether "courts can constitutionally determine the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance." *Christians*, 82 F.3d at 1418. Instead, the majority chose simply to "assume" that the recovery from the Church (not from the Debtors) of an amount equivalent to the tithes "substantially burdened" the Debtors who had given the tithes months before. For the reasons suggested by the Supreme Court in *Smith*, it is understandable that the majority in the present case did not "presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. But RFRA statutorily requires such presumption from the courts. 42 U.S.C. § 2000bb-1(a). Thus RFRA requires an inquiry that this Court has held improper for courts to

undertake, and that the panel in the present case refused to undertake.

Here, by refusing to undertake the factual inquiry necessary to determine "substantial burden" (indeed, the record in the case, as opposed to the lawyers' argument, contains nothing to support a "substantial burden") the majority held by default that a religious practitioner who has fully completed his practice of tithing, and whose tithe is later taken away, not from the religious practitioner but from the recipient of the tithe, is thereby himself not only "burdened," but "substantially" so, in his religious activity. According to the majority, a "retroactive" impact on only the beneficiary of a religious activity must be "assumed" to be a "substantial burden" to the practitioner who completed the religious activity months earlier, perhaps because the ultimate wished-for goal of the tithe was not achieved. This is tantamount to holding that under the First Amendment the government must not only permit a person to pray, but must also ensure that his prayers are answered.

Plainly, it cannot substantially burden the *Debtors'* exercise of religion for a bankruptcy trustee to recover from the *Church* an amount equivalent to the Debtors' earlier monetary gifts to the Church.[8] Thus if RFRA is

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[8] *See In re Newman*, 183 B.R. 239 (Bankr. D. Kan. 1995) (because the debtor has already completed his tithe when the bankruptcy trustee later recovers the equivalent amount of money from the church, § 548(a)(2) does not substantially burden the debtor's exercise of religion), *aff'd*, 203 B.R. 468 (D. Kan. 1996). *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995), cited by the majority in the appellate court's first opinion, is fundamentally distinguishable because *Tessier*, being a Chapter 13 case, held – prior to holding RFRA unconstitutional – that it

constitutional, this Court should overrule the court of appeals and give necessary guidance on the threshold statutory issue of "substantial burden."[9]

Likewise, if RFRA is constitutional, this Court's guidance is needed concerning RFRA's command that courts determine which governmental interests are to be deemed "compelling." RFRA gives no guidance in this regard, except to reference unnamed "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). Yet one of the authors of RFRA maintains that "[t]he Supreme Court has been very inconsistent on what it means by compelling state interest." Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 901 (1994); *see also Swanner v. Anchorage Equal Rights Comm'n*, 115 S. Ct. 460 (1994) (Thomas, J., dissenting from denial of petition for writ of certiorari). Thus RFRA leads to the possibility of arbitrary determinations of what is a compelling state interest. The Eighth Circuit, for example, has now held that there is not any compelling state interest in the Bankruptcy Code's careful balance of the rights of debtors and creditors authorized expressly by Article I, § 8, of the Constitution, but that there is a compelling state interest in the hair length of prisoners. *Compare Christians*, 82 F.3d at 1419-20, *with Hamilton*, 74 F.3d at 1554-55. At least one other court has held that the Bankruptcy Code provision at issue in the present case **does**

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would substantially burden a debtor's religious exercise if he were prohibited by his Chapter 13 plan from tithing **in the future**.

[9] The United States Courts of Appeal are split on the meaning of "substantial burden" in the context of RFRA. *See Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *cert. granted, judgment vacated, and remanded*, 117 S. Ct. 2502 (1997).

serve a compelling state interest. *See In re Newman*, 183 B.R. 239, 251-52 (Bankr. D. Kan. 1995), *aff'd*, 203 B.R. 468 (D. Kan. 1996); *cf. In re Turner*, 193 B.R. 548, 555-56 (Bankr. N.D. Cal. 1996) (compelling state interest exists for Bankruptcy Code requirement that petition preparers subscribe their Social Security numbers on documents). If RFRA is constitutional, therefore, this Court's guidance is sorely needed on the meaning of "compelling interest."

CONCLUSION

Flores holds that RFRA contradicts the separation of powers. The court of appeals holds that RFRA does not. The court of appeals' decision constitutes a bold repudiation of this Court's decision in *Flores*. To uphold its authority, and for all of the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This Court should then summarily reverse the decision of the court of appeals.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-2267

In re: Bruce Young; In re: Nancy Young,	*	
Julia A. Christians, Appellee,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Crystal Evangelical Free Church, Appellant.	*	
United States of America, Intervenor on Appeal,	*	
Christian Legal Society; The National Association of Evangelicals; Americans United for Separation of Church and State; Concerned Women for America; The Baptist Joint Committee on Public Affairs; The Southern Baptist Convention; The General Conference of Seventh-Day Adventists; The Evangelical Lutheran Church in America, Amici Curiae.	*	

United States Senator Orrin G. Hatch; The Church of Jesus Christ of Latter-Day Saints; Catholic League for Religious and Civil Rights; Traditional Values Coalition; Worldwide Church of God,

Amicus Curiae.

Coalition for the Free Exercise of Religion,

Amicus on Behalf of Appellant.

Submitted: December 8, 1997
Filed: April 13, 1998

Before McMILLIAN and MAGILL, Circuit Judges, and BOGUE,* District Judge.

MAGILL, Circuit Judge.

In our earlier opinion in this matter we reversed the district court and held that under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, bankruptcy debtors' religious tithes could not be recovered from a church as avoidable transactions in adversary proceedings. *See Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1420 (8th Cir. 1996). In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme

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* THE HONORABLE ANDREW W. BOGUE, United States District Judge for the District of South Dakota, sitting by designation.

Court held that RFRA was unconstitutional as applied to *state law* because Congress had exceeded its enforcement powers under § 5 of the Fourteenth Amendment. The Supreme Court subsequently summarily vacated and remanded our decision in *Christians* for reconsideration in light of *Flores*. *See Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502, 2502 (1997). Upon reconsideration, we conclude that, under the Bankruptcy Clause and the Necessary and Proper Clause of Article I of the Constitution, RFRA is constitutional as applied to *federal law*. Accordingly, we reinstate our previous decision, and again reverse the district court.

I.

Bruce and Nancy Young are active members of the Crystal Evangelical Free Church (the Church). In accordance with their religious beliefs, the Youngs tithed ten percent of their annual income to the Church. While the Church teaches that its members should contribute to support the Church, it does not require payment for attendance or membership, and would provide all services to the Youngs regardless of the amount of their tithes. Between February 1991 and February 1992, the Youngs tithed $13,450.00 to the Church.

The Youngs filed a joint Chapter 7 bankruptcy petition in February 1992. Because the Youngs had been insolvent during the previous year, bankruptcy trustee Julia Christians (the Trustee) sought to avoid the Youngs' tithes to the Church as fraudulent transfers under 11 U.S.C. § 548(a)(2)(A). Both the bankruptcy court and the district court held that the tithes to the church were

avoidable transactions, and allowed the Trustee to recover the tithes from the Church.

To avoid the Youngs' tithes under 11 U.S.C. § 548(a)(2)(A), the Trustee had the burden of proving that "(1) there was a transfer of the debtors' interest in property (2) made on or within a year preceding the filing of the petition (3) while the debtors were insolvent (4) in exchange for which the debtors received less than reasonably equivalent value." *Christians*, 82 F.3d at 1410. The parties stipulated that the first three factors were present. *See id.* We held that the Trustee had also proven the fourth factor, because the Church did not premise any of its services on the Youngs' tithes and therefore did not provide anything *in exchange* for the tithes. *See id.* at 1415. Accordingly, we held that the Youngs' tithes would ordinarily be avoidable transactions. *See id.* at 1416.

We also concluded, however, that allowing the Trustee "recovery of the contributions substantially burdens the debtors' free exercise of their religion and is not in furtherance of a compelling governmental interest and therefore violates the RFRA." *Id.* at 1417. Because "RFRA provides a defense against the order of the district court permitting the trustee to avoid the debtors' contributions to the church," we held that "[t]he trustee is not entitled to recover $13,450 from the church." *Id.* at 1420.

After this Court denied the Trustee's petition for rehearing en banc, *see Christians v. Crystal Evangelical Free Church (In re Young)*, 89 F.3d 494, 494 (8th Cir. 1996), the Supreme Court held that RFRA was unconstitutional as applied to state law. *See Flores*, 117 S. Ct. at 2172. Subsequently, the Supreme Court granted certiorari in the

instant case, vacated our initial opinion, and remanded for reconsideration in light of *Flores*. *See Christians*, 117 S. Ct. at 2502. On remand, the Trustee argues that RFRA is unconstitutional as applied to federal law because Congress violated the separation of powers doctrine in enacting the statute and because RFRA violates the Establishment Clause of the First Amendment.

II.

A. RFRA and *Flores*

RFRA was enacted as a legislative response to the Supreme Court's decision in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that the First Amendment "right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quotations omitted). In reaching this holding, the Supreme Court effectively overruled precedent that had provided greater protection to individuals whose religious practices were burdened by the operation of neutral laws. *See id.* at 883-85 (rejecting rule of *Sherbert v. Verner*, 374 U.S. 398 (1963), that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest").

Congress enacted RFRA to limit the *Smith* decision's impact on the practice of religious liberties. Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious

exercise," and concluded that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb(a)(2) & (3). Congress enacted RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened [and] to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(1) & (2).

RFRA codified the compelling interest test of *Sherbert* and *Yoder*, and provided that the government could "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1) & (2). Congress intended RFRA to apply "to all Federal and State law." 42 U.S.C. § 2000bb-3(a); *see also* 42 U.S.C. § 2000bb-2(1) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State").

Whether Congress has the authority to impose RFRA on state law was soon questioned, *see, e.g., Hamilton v. Schriro*, 74 F.3d 1545, 1570 (8th Cir.) (McMillian, J., dissenting) ("Because Congress does not have the power under § 5 of the Fourteenth Amendment to enact RFRA, I would hold that the Religious Freedom Restoration Act is unconstitutional."), *cert. denied*, 117 S. Ct. 193 (1996), and the Supreme Court ultimately declared that this part of

RFRA was beyond Congress's power to enact. *See Flores*, 117 S.Ct. at 2172.

As the *Flores* Court noted, "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States." *Id.* at 2162. The enforcement power of § 5 of the Fourteenth Amendment is remedial and only allows Congress to preserve rights already protected by the Fourteenth Amendment. *See id.* at 2164. However, the Fourteenth Amendment, incorporating the Free Exercise Clause of the First Amendment, does not protect individuals practicing their religious beliefs from the operation of neutral law. *See Smith*, 494 U.S. at 879. Because RFRA's protection went far beyond the protection offered by the *Smith* Court's authoritative interpretation of the First Amendment, as incorporated into the Fourteenth Amendment, Congress exceeded the authority provided in § 5 of the Fourteenth Amendment to enforce the Amendment. *See Flores*, 117 S. Ct. at 2164 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."); *id.* at 2170 ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.").

B. Severability

The Flores Court did not reach any decision as to the constitutionality of RFRA as applied to federal law. By its

terms, the Fourteenth Amendment is applicable only to the states, and not to the federal government. *See* U.S. Const. amend. XIV, § 1. In applying RFRA to the federal government, Congress relied on its enumerated powers in Article I of the Constitution. *See* H.R. Rep. No. 103-88, at 17 (1993) ("Finally, the Committee believes that Congress has the constitutional authority to enact [RFRA]. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value. . . . "). In concluding that Congress could not rely on § 5 of the Fourteenth Amendment to impose RFRA on state governments, the *Flores* Court did not address whether Congress could, pursuant to its Article I authority, constitutionally impose RFRA on *federal* law. Despite this omission, the Trustee in the instant case contends that the Supreme Court's decision in *Flores* "means that RFRA is a dead-letter" and that "[t]his Court cannot apply it here." Appellee's Br. at 2. We disagree.

Where the Supreme Court strikes down one portion of a statute, we must presume that other portions of the same statute remain in effect "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS v. Chadha*, 462 U.S. 919, 931-32 (1983) (quotations and alteration omitted); *see also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute *if the balance of the legislation is incapable of functioning independently*."

(emphasis added)). Congress's goal in enacting RFRA was to protect religious liberties as fully as possible from encroachment by all government actors. RFRA's protection against federal interference with religious liberties is independent and distinct from its protection against state interference, and there is nothing in RFRA's text or legislative history to suggest that Congress would have declined to protect religious liberties from federal interference merely because it was unable to protect those liberties from state interference. Assuming that RFRA is constitutional as applied to federal law, we conclude that the portion of RFRA applicable to the federal government is fully severable from the portion applicable to the states. *See Alaska Airlines*, 480 U.S. at 684 ("A court should refrain from invalidating more of the statute than is necessary. Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." (quotations and alterations omitted)).

III.

The Trustee argues that RFRA violates the separation of powers doctrine and the Establishment Clause of the First Amendment, and is therefore unconstitutional as applied to federal law. We address these issues in turn.

A. Separation of Powers: The Bankruptcy Clause and the Necessary and Proper Clause

The Trustee apparently suggests that, because Congress disagreed with the Supreme Court's interpretation

of the First Amendment, RFRA necessarily constitutes a violation of the separation of powers doctrine. We disagree.

The framers of the Constitution created co-equal branches of government with distinct responsibilities and authorities. "The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to prescribe the rules by which the duties and rights of every citizen are to be regulated, but the power of the interpretation of the laws would be the proper and peculiar province of the courts." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995) (quotations and alterations omitted). The judicial authority to "say what the law is" extends to the interpretation of the Constitution itself. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803). While Congress can seek to change the meaning of the Constitution through amendment, *see* U.S. Const. art. V, it may not do so through the passage of ordinary legislation. *See Flores*, 117 S. Ct. at 2168 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.' " (ellipses in original) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

While Congress cannot, through ordinary legislation, amend the Court's authoritative interpretation of the Constitution, "congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that

power in the first place." *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1562 (11th Cir. 1984); *see also Flores*, 117 S.Ct. at 2171 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic."). Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection. *See, e.g.*, Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and providing journalists with greater protection against searches and seizures); National Defense Authorization Act for Fiscal Years 1988 and 1989, § 508, 10 U.S.C. § 774 (reacting to *Goldman v. Weinberger*, 475 U.S. 503 (1986), and providing that members of military were entitled to wear religious headgear); *cf* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (reacting to *Geduldig v. Aiello*, 417 U.S. 484 (1974), and equating employment discrimination based on pregnancy with employment discrimination based on gender). Because Congress need not agree with everything the Supreme Court does in order for its legislation to pass constitutional muster, we conclude that RFRA is not contrary to the Constitution merely because Congress disagreed with the *Smith* Court's interpretation of the Free Exercise Clause.

The key to the separation of powers issue in this case is thus not whether Congress disagreed with the Supreme Court's constitutional analysis, but whether Congress acted beyond the scope of its constitutional authority in applying RFRA to federal law. Because the "principle of

the law of federal courts [is] that constitutional issues affecting legislation will not be determined in broader terms than are required by the precise facts to which the ruling is to be applied," *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 469 (D.C. Cir. 1996) (quotations and alteration omitted), we examine whether Congress had the constitutional authority to apply RFRA to the Bankruptcy Act.

Article I of the Constitution gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Unlike the limited scope of authority granted to Congress by § 5 of the Fourteenth Amendment to enforce that Amendment, "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Chadha*, 462 U.S. at 941 (quotations and citation omitted). The Supreme Court has explained that Congress's authority under the Bankruptcy Clause

> extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject – distribution and discharge – are in the competency and discretion of Congress. With the policy of a law, letting in all classes, – others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers.

Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902) (quotations omitted).

The Constitution also gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its bankruptcy power. U.S. Const. art. I, § 8, cl. 18. In considering the authority granted by the Necessary and Proper Clause to Congress to execute the powers enumerated in Article I, the Supreme Court has explained that:

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

We conclude that RFRA is an appropriate means by Congress to modify the United States bankruptcy laws. In attempting to avoid the Youngs' tithes to the church, the Trustee relied on an affirmative act of Congress defining which transactions of debtors in bankruptcy may be avoided. *See* 11 U.S.C. § 548(a)(2)(A). RFRA, however, has effectively amended the Bankruptcy Code, and has engrafted the additional clause to § 548(a)(2)(A) that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed unless it is the

least restrictive means to satisfy a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a) & (b). The Trustee has not contended, and we can conceive of no argument to support the contention, that Congress is incapable of amending the legislation that it has passed. *See Catholic Univ. of Am.*, 83 F.3d at 470 ("We doubt that [a Title VII plaintiff challenging the constitutionality of RFRA as applied to federal law] would argue that Congress lacks at least the facial authority to determine against whom, and under what circumstances, Title VII and other federal laws will be enforced."). Neither can we accept any argument that allowing the discharge of a debt in bankruptcy and preventing the recovery of a transfer made by insolvent debtors is beyond the authority of Congress. *See Hanover Nat'l Bank*, 186 U.S. at 186. We therefore conclude that Congress had the authority to enact RFRA and make it applicable to the law of bankruptcy.

B. Establishment Clause

In enacting RFRA, Congress sought to preserve First Amendment values by protecting the exercise of religious beliefs from substantial burdens imposed by the operation of otherwise neutral laws. *See* S. Rep. No. 103-111, at 14 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1892, 1903. Although the Supreme Court has repeatedly held that excepting religious organizations from the sweep of neutral laws does not violate the Constitution, *see, e.g., Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338-40 (1987) (exemption from federal antidiscrimination laws for religious organizations does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437, 460 (1971)

(exemption from military draft for religious conscientious objectors does not violate Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (state property tax exemption for religious organizations does not violate Establishment Clause), the Trustee nevertheless contends that Congress violated the Establishment Clause of the First Amendment. We disagree.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Supreme Court has explained that "[t]he language of the Religion Clauses of the First Amendment is at best opaque," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and that a "law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause." *Id.* The Court has, however, identified "three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* (quotations omitted); *see also Gillette*, 401 U.S. at 449 (noting that "the central purpose of the Establishment Clause" is "ensuring governmental neutrality in matters of religion").

The Supreme Court's interpretation of the Establishment Clause does "not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614. Indeed, the "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause," *Hobbie v. Unemployment*

Appeals Comm'n, 480 U.S. 136, 144-45 (1987) (quotations omitted), and that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673.

The *Lemon* Court warned that, in determining whether the Establishment Clause has been violated, courts are not "to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance." *Lemon*, 403 U.S. at 614. In examining this substance, the Supreme Court crafted a three-part test to determine if a statute avoids a violation of the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (quotations and citations omitted). We believe that RFRA has met each of these three elements.

We conclude that RFRA, although designed to protect religious rights, has a secular purpose. That a law must have a secular purpose "does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Corporation of the Presiding Bishop*, 483 U.S. at 335 (quotations and

citations omitted). Rather, the Supreme Court has explained that "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker – in this case, Congress – from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.*

Congress's purpose in enacting RFRA was not to benefit a particular religious sect, but rather to protect one of "the most treasured birthrights of every American" – the "right to observe one's faith, free from Government interference." S. Rep. No. 103-111, at 4, *reprinted in* 1993 U.S.C.C.A.N. at 1893-94. This effort to protect First Amendment values is "neutral in the sense of the Establishment Clause." *Gillette*, 401 U.S. at 453. The Supreme Court has explained that "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Id.* (quotations omitted); *see also Corporation of the Presiding Bishop*, 483 U.S. at 335 ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.").

Nor do we believe that RFRA improperly advances or inhibits religion under the second prong of the *Lemon* test. Rather than providing an affirmative benefit to religion, RFRA only protects individuals from laws which "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). As the Supreme Court has noted, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must

be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of the Presiding Bishop*, 483 U.S. at 337 (emphasis in original).

It is true, of course, that RFRA treats religion differently than irreligion. In a brief, separate concurrence to the opinion in *Flores*, Justice Stevens stated his belief that RFRA "is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution" because "governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Flores*, 117 S. Ct. at 2172 (Stevens, J., concurring). This viewpoint is in direct contradiction to the declaration of a majority of the Supreme Court in *Corporation of the Presiding Bishop*, where the Court explained that it

> has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

483 U.S. at 338 (citation omitted); *see also Gillette*, 401 U.S. at 454 (" 'Neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." (citation omitted)).

Finally, it does not appear to us that RFRA "foster[s] an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613 (quotations omitted). Indeed, RFRA was designed to *prevent* such an entanglement by limiting the impact that neutral laws have on religion. *See Corporation of the Presiding Bishop*, 483 U.S. at 339 ("It cannot be seriously contended that [the statute] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case. The statute easily passes muster under the third part of the *Lemon* test.").

RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA. Because the portion of RFRA applicable to federal law violates neither the separation of powers doctrine nor the Establishment Clause, we conclude that RFRA is constitutional. Accordingly, we reinstate our earlier decision in this matter, and again reverse the district court.

BOGUE, Senior District Judge, dissenting.

I respectfully dissent on two grounds. Initially, assuming as the majority concludes, that RFRA is constitutional as applied to federal law, I re-urge my dissent contained in this Court's original opinion reversing the district court in this matter. *See, Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1421-1423 (8th Cir. 1996). I would conclude that the trustee's recovery of the tithed monies does not substantially burden the debtors' free exercise rights, that the bankruptcy code

and § 548(a)(2) further a compelling governmental interest, and that § 548(a)(2) is the least restrictive means of furthering that interest. *Id.*

Alternatively, I would hold that RFRA is unconstitutional even as applied to federal law, and on that basis affirm the district court. Our instruction on the remand from the Supreme Court is to conduct further proceedings *in light of City of Boerne v. Flores*. As the majority indicates, in *Flores* the Supreme Court held RFRA unconstitutional as applied to state law because Congress exceeded its enforcement powers under § 5 of the Fourteenth Amendment. In my opinion, however, *Flores* does more than merely declare RFRA unconstitutional as applied to state law. In broader terms, *Flores* dictates that, despite the broadest reach of Congress' plenary powers, there is a point beyond which Congress may not go in the exercise the of its power without intruding upon the core function of the judicial branch, thereby offending "vital principles necessary to maintain separation of powers. . . . " *Flores*, 117 S.Ct. 2157, 2172 (1997). This rationale of *Flores* applies to federal law, as well as state law.

In addition to its holding that RFRA exceeded Congress' enforcement power because it so lacked congruence and proportionality that it could not be considered remedial or preventive legislation, *Flores* also held that RFRA went "beyond congressional authority" by invading the "province of the Judicial Branch." *Id.* at 2172. RFRA was both beyond the scope of the power of Congress and violative of the separation of powers doctrine. Congress makes no secret of the fact that the express purpose of RFRA is to displace the Supreme Court's

decision in *Employment Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and return the Court's "compelling interest" test to Free Exercise jurisprudence. *See*, 42 U.S.C. § 2000bb(b) (the act's stated purposes are "to restore the compelling interest test as set forth in [the Court's pre-*Smith* cases] and to guarantee its application in all cases where free exercise of religion is substantially burdened"); *and, Flores*, 117 S.Ct. at 2160 and 2171 (RFRA was enacted "in direct response to the Court's decision in [*Smith*]" and attempts a "substantive change of its holding"). In essence Congress, through RFRA, attempts to impose upon the judiciary, a standard of review for interpreting constitutional rights which it believes is a better standard than that crafted by the Court itself. This extraordinary exercise of power is postured as the creation of a "claim or defense to persons whose religious exercise is substantially burdened by government". 42 U.S.C. § 2000bb(b). The very existence of one's "claim" or right to be free from substantial burdens on the exercise of his or her religion, however, derives from the Supreme Court's interpretation of the constitution and its opinion as to what it means to have a right to the "free exercise" of one's religion. As the *Flores* Court explained, because the text of the First Amendment is ambiguous on the meaning of "free exercise,"[1] we look to the Court to interpret the Constitution and the Free Exercise clause in its exclusive province to "say what the law is." *Flores*, 117 S.Ct. at 2172 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch)

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. Const. amend. I.

137, 177, 2 L.Ed. 60 (1803)). Thus, when the Supreme Court decrees, insofar as one's right of free exercise is concerned, that a facially neutral, generally applicable law may be applied to religious practices even when not supported by a compelling governmental interest, *Smith*, 494 U.S. at 879, 110 S.Ct. at 1600, that decree defines the parameters of the constitutional right. And although Congress has the power to "enforce" constitutional rights, *Flores*, 117 S.Ct. at 2163, it is powerless to enforce a free exercise right different from that which the Supreme Court has determined to be the right. *Id.* at 2164. ("Congress does not enforce a constitutional right by changing what the right is."). Yet this is precisely what Congress is attempting to do with its passage of RFRA. *See*, Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 Chapman Univ. Nexus Journal of Opinion, 73, 77 (1997) ("RFRA is designed to protect the rights the judiciary would find and protect if the courts were to use the compelling governmental interest test with respect to neutral laws that incidentally burden religious exercises."). Such attempt, even as applied to federal law, in my opinion, is a serious breach of the separation of powers doctrine.

"The power to interpret the Constitution in a case or controversy remains in the Judiciary," *Flores*, 117 S.Ct at 2166, and "[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." *Id.* at 2172. This duty represents one of the core functions of the Judicial Branch, reserved to it by the Constitution.

U.S. Const. art. III § 2. "The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited. . . . ' " *Flores*, 117 S.Ct. at 2162 (citing *Marbury*, 1 Cranch at 176). Yet, RFRA is expressly "designed to control cases and controversies." *Id.* at 2172; 42 U.S.C. 2000bb(b)(1). By forcing a standard of review upon the Article III judiciary, for the Court to apply in its adjudication of cases and controversies, Congress has gone beyond its limited and defined powers, intruded upon, and usurped a core function of the Article III branch.

The separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch. *United States v. Lopez*, 514 U.S. 549, 552, 115 S.Ct. 1624, 1626, 131 L.Ed.2d 626 (1995) (citation omitted). "[T]he system of separated powers and checks and balances established in the constitution was regarded by the Framers as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' " *Morrison v. Olson*, 487 U.S. 654, 693, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988) (citation omitted). Maintaining the separation of powers is an essential part of the Constitutional structure and plays a vital role in securing freedom for all. *Lopez*, 514 U.S. at 578, 115 S.Ct. at 1639 (Kennedy, J., concurring). "[T]he courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *Flores*, 117 S.Ct. at 2172. To that end,

> [w]hen the political branches of the Government act against the background of a judicial interpretation of the constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.

Id.

In *Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), on grounds that Congress exceeded its authority under the Commerce Clause to regulate commerce among the several states. *Lopez*, 514 U.S. at 551, 115 S.Ct. at 1626. The Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe is a school zone." *Id.* But because by its terms the statute had nothing to do with commerce or any economic enterprise whatsoever, and did not substantially affect interstate commerce, Congress lacked the power to enact the legislation in the first instance. *Id.*, 514 U.S. at 561, 115 S.Ct. at 1630-31. The Lopez opinion confirms that Congress' plenary power, though broad indeed, is subject to outer limits which the Court has ample power to enforce, and will enforce. *Id.*, 514 U.S. at 557, 115 S.Ct. at 1628-29. Preservation of the constitutional structure is of primary importance to all officers of the Government, and it is the duty of the Court to "intervene when one or the other [branch] of Government has tipped the scales too far." *Id.*, 514 U.S. at 578, 115 S.Ct. at 1639 (Kennedy, J., concurring). More recently the Court reemphasized the importance of maintaining the constitutional structure and separation of

powers, and reaffirmed its duty to call into check impermissible exercises of Congressional power. *See, Printz v. United States*, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (striking portions of the Brady Handgun Violence Prevention Act as beyond Congress' authority to enact pursuant to its powers under the Commerce and Necessary and Proper clauses); *See also, New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (declaring Congress powerless to compel states to enact or administer federal radioactive waste regulatory programs). With respect to RFRA as applied to federal law, the Court has the power and obligation to check exercises of Congressional power which it deems excessive and unconstitutional. In my opinion, *Flores* and the Court's precedents do as much.

The majority concludes that Congress has the authority to enact RFRA and graft it onto all federal congressional law, and onto § 548(a)(2)(A) of the Bankruptcy Code in particular. Slip Op. at 11. I agree with the majority that Congress, in its plenary power to establish "uniform Laws on the subject of Bankruptcies," is indeed capable of amending any bankruptcy legislation that it has passed. Establishment Clause issues aside, there is no question that Congress could re-draft § 548 to include an exemption, for all religious tithes, from the avoidance power of the trustee. But that is not what Congress did here. What Congress did, in reality, was attempt to make a substantive change in free exercise rights, and then impose its interpretation of what the right ought to be onto the courts via "grafts" onto every federal law. Before one can say that Congress may permissibly change the Bankruptcy Code to accommodate the provisions of

RFRA, however, one must assume the constitutionality of RFRA in the first instance. But if RFRA does not pass constitutional muster, as I conclude, then Congress is powerless to change the Bankruptcy Code through its power under the Necessary and Proper Clause. That is, although Congress has "the power '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its bankruptcy power," Slip Op. at 11, it does not have the power to execute its bankruptcy power with a law which is not necessary and proper for that purpose.

As the majority notes, "[i]n considering the authority granted by the Necessary and Proper Clause to Congress to execute the powers enumerated in Article I the Supreme Court has explained: . . . 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.' " Slip Op. at 11 (citing, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819). This three prong *M'Culloch* test is used to assess the validity of the exercise by Congress of any of its powers pursuant to the Necessary and Proper Clause. In *Flores*, the Court indicated that RFRA, as applied to state a law, failed the first prong of the *M'Culloch* test. *Flores*, 117 S.Ct. at 2164 (legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the clause under § 5 of the Fourteenth Amendment). I would conclude that it fails the first prong as applied to federal law as well. As noted, Congress' express intent in passing RFRA was to restore the compelling interest test to Free Exercise jurisprudence. 42 U.S.C. § 2000bb(b). This seeks to change the

Court's interpretation of the Free Exercise Clause and work a substantive change in free exercise rights, which is not a "legitimate end," and which cannot fairly be said to be necessary and proper for carrying into execution the Bankruptcy powers. *See also*, Gressman, 2 Chapman Univ. Nexus Journal of Opinion at 82-83 (arguing RFRA as applied to federal law fails all three prongs of *M'Culloch* test). To paraphrase the *Printz* decision, "[w]hen a law- . . . for carrying into execution the [Bankruptcy Clause] violates the principle of [separation of powers] . . . it is not a law . . . proper for carrying into execution of the [Bankruptcy Clause], and is thus, in the words of the Federalist, 'merely an act of usurpation' which deserves to be treated as such." *Printz*, 117 S.Ct. at 2379 (internal quotations and citations omitted).

I do not suggest by my dissent that Congress' goal of "protect[ing] religious liberties as fully as possible from encroachment by all government actors," Slip Op. at 7, is somehow evil or untoward. To the contrary, Congress' efforts to protect religious freedom are most commendable and rightly pursued through the proper channels (*e.g.*, a constitutional amendment); but not at the expense of the constitution.

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power

> among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 187, 112 S.Ct. at 2434.

I believe that with the passage of RFRA, Congress has gone beyond its authority and "tipped the scales too far." It has impermissibly intruded upon the province of the Article III branch by imposing upon the courts a standard of review to be applied in all cases and controversies involving the free exercise of religion. Accordingly, I would conclude that RFRA is unconstitutional as applied to federal law. It follows, therefore, that I would affirm the order of district court allowing the trustee to bring the tithed monies back into the debtors' estate pursuant to 11 U.S.C. § 548(a).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 27, 1997

Mr. Richard Thomas Thomson
One Financial Plaza, #1800
120 South Sixth Street
Minneapolis, MN 55402

Re: Julia A. Christians, Trustee
v. Crystal Evangelical Free Church
No. 96-437

Dear Mr. Thomson:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of City of Boerne v. Flores, 521 U. S. – ___ (1997).

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

In re Bruce YOUNG; In re Nancy Young.

Julia A. CHRISTIANS, Appellee,

United States of America, Intervenor,

v.

CRYSTAL EVANGELICAL FREE CHURCH, Appellant.

Christian Legal Society; The National Association of Evangelicals; Americans United for Separation of Church and State; Concerned Women for America; The Baptist Joint Committee on Public Affairs; The Southern Baptist Convention; The General Conference of Seventh-Day Adventists; The Evangelical Luthern [sic] Church in America, Amicus Curiae.

United States Senator Orrin G. Hatch; The Church of Jesus Christ of Latter-Day Saints; Catholic League for Religious and Civil Rights; Traditional Values Coalition; Worldwide Church of God, Amicus Curiae.

No. 93-2267.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 15, 1994.

Decided May 6, 1996.

Petition for Rehearing and Suggestion for Rehearing En Banc Denied June 27, 1996.*

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* Judge Beam wrote an opinion specially concurring in the denial of the petition for rehearing en banc. The opinion will be published in a later volume of F.3d.

Appeal from the United States District Court for the District of Minnesota; Harry H. MacLaughlin, Judge.

Kenneth Corey-Edstrom, Brooklyn Center, MN, argued, for appellant.

Douglas Laycock, Austin, TX, argued, for amici curiae.

Richard Thomas Thomson, Minneapolis, MN, argued, for appellee.

Before McMILLIAN and MAGILL, Circuit Judges, and BOGUE,* District Judge.

McMILLIAN, Circuit Judge.

The Crystal Evangelical Free Church (hereinafter the church) appeals from a final order entered in the District Court for the District of Minnesota affirming an order entered in the Bankruptcy Court for the District of Minnesota that required the church to turn over to trustee Julia A. Christians certain funds debtors Bruce and Nancy Young had contributed to the church as tithes during the year preceding the filing of their petition for bankruptcy. *In re Young*, 148 B.R. 886 (Bankr.D.Minn.1992), *aff'd*, 152 B.R. 939 (D.Minn.1993). For reversal, the church argues that the contributions were not avoidable under 11 U.S.C. § 548(a)(2) because the contributions were not made in exchange for less than "reasonably equivalent value." The church also argues that requiring it to turn over the contributions discriminates against religion and violates the free exercise clause of the first amendment. For the

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* The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

reasons discussed below, we reverse the order of the district court.

BACKGROUND FACTS

The facts are not disputed. The debtors are active members of the church. For several years, as part of their religious belief and practice, the debtors voluntarily contributed certain funds as tithes to the church; they did not receive money or tangible property in exchange for their contributions. Tithing is a spiritual and financial practice. Believers traditionally give a tithe, or tenth, of their income to a religious organization such as a church. See Lev. 27:1, 30, 32 (New International Version) ("The Lord said to Moses. . . . A tithe of everything from the land, whether grain from the soil or fruit from the trees, belongs to the Lord; it is holy to the Lord. . . . The entire tithe of the herd and flock – every tenth animal that passes under the shepherd's rod – will be holy to the Lord."). The church teaches that Christians should offer regular contributions to support the work and message of the church. However, the church does not insist on a particular amount or require payment of membership or attendance fees. Members and non-members are welcome at worship services and other church services whether they tithe or not. It is not disputed that the debtors are sincere in their religious faith.

In February 1992 the debtors filed a joint Chapter 7 bankruptcy petition. During the year preceding the filing of their Chapter 7 petition, and at a time when they were insolvent, they contributed a total of $13,450.00 to the church. The trustee filed this adversary proceeding

against the church in order to recover those contributions as "fraudulent transfers" under 11 U.S.C. § 548(a)(2)(A).[1] The parties filed cross-motions for summary judgment. In order to avoid transfers under 11 U.S.C. § 548(a)(2)(A), the trustee must prove that (1) there was a transfer of the debtors' interest in property (2) made on or within a year preceding the filing of the petition (3) while the debtors were insolvent (4) in exchange for which the debtors received less than reasonably equivalent value. The parties stipulated to the existence of the first three factors; the only factor in dispute was whether the debtors received "reasonably equivalent value" "in exchange for" their contributions to the church.

DECISION OF THE BANKRUPTCY COURT

The bankruptcy court granted the trustee's motion for summary judgment and denied the church's motion. The bankruptcy court held that the debtors' contributions to the church were avoidable transfers under

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[1] 11 U.S.C. § 548(a) provides in part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

. . . .

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

. . . .

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

§ 548(a)(2)(A) because the debtors did not receive "reasonably equivalent value" "in exchange for" their contributions. 148 B.R. at 890-93. The bankruptcy court concluded that "value" referred solely to economic value, that is, "property" in a physical or material sense, and that religious services, theological programs and access to the church's facilities did not meet this economic definition of value. *Id.* at 891, 895-96 (rejecting *In re Moses*, 59 B.R. 815, 818 (Bankr.N.D.Ga.1986) (*Moses*) (holding church services constitute property within meaning of § 548), and *In re Missionary Baptist Foundation of America*, 24 B.R. 973, 979 (Bankr.N.D.Tex.1982) (*Upreach*) (holding good will constituted reasonably equivalent value in exchange for charitable contributions to church)).

The bankruptcy court also concluded that the contributions were not economically beneficial to the debtors. 148 B.R. at 893. In the bankruptcy court's view, any benefit was strictly religious and thus merely incidental and enjoyed by the debtors individually and not by either their pre-petition or post-petition estate. *Id.* at 893-94 & n. 10. The bankruptcy court also noted that the judicial system cannot differentiate between "religious" benefits and "secular" benefits, much less put a value on those benefits, and that any value calculation would be "fraught with the sort of entanglement that the Constitution forbids," and that the debtors' contributions to the church were thus avoidable as fraudulent transfers under § 548(a)(2)(A). 148 B.R. at 893-96 & n. 13, 896 & n. 17 (noting potential excessive entanglement problems in having courts calculate value of religious services, even though parties did themselves did not raise first amendment concerns).

The bankruptcy court also determined that, even assuming the debtors received value, that value had not been received "in exchange for" their contributions because no exchange took place. *Id.* at 895-96. As noted by the bankruptcy court, the church made available worship services and religious programs to all members, including the debtors, without in any way linking those services to financial contributions. *Id.* at 894 (noting that debtors could not have received property in exchange for their contributions for purposes of § 548(a) and at the same time treated those contributions as charitable deductions under 26 U.S.C. § 170(c)(4)). *See Hernandez v. Commissioner*, 490 U.S. 680, 691, 109 S.Ct. 2136, 2144-45, 104 L.Ed.2d 766 (1989) (quid pro quo is inconsistent with charitable contribution); *United States v. American Bar Endowment*, 477 U.S. 105, 118, 106 S.Ct. 2426, 2433-34, 91 L.Ed.2d 89 (1986) ("The sine qua non of a charitable contribution is a transfer of money or property without adequate consideration."). The bankruptcy court declared the transfers void and ordered the trustee to recover from the church $13,450.00, plus interest and costs. The church appealed the decision of the bankruptcy court to the district court.

DECISION OF THE DISTRICT COURT

On appeal, the district court affirmed the bankruptcy court's statutory interpretation and analysis of § 548(a)(2)(A) and agreed that the debtors did not receive "reasonably equivalent value" for their contributions to the church. 152 B.R. at 948. The district court also found that neither the religious services nor the tax deductions

for charitable contributions constituted reasonably equivalent value under § 548(a)(2)(A). *Id.* at 948-49. The district court agreed with the bankruptcy court's decision not to follow *Upreach* and *Moses*. In the district court's view, good will and church services are not the kind of "fairly concrete" benefits required to constitute reasonably equivalent value, and neither case addressed the "in exchange for" requirement. *Id.* at 950. The district court noted that church services and charitable deductions were not given "in exchange for" the debtors' contributions. *Id.* at 949-50. The district court also distinguished *Moses* from the present case on the ground that in *Moses* the church had required the contributions as a condition of the debtor's employment as a deacon. *Id.* at 950. In the present case the parties stipulated that the debtors were not required to contribute in order to attend church services or otherwise participate in church programs.

On appeal in the district court, the church argued for the first time that applying § 548(a) would violate the free exercise and establishment clause of the first amendment. The district court exercised its discretion to consider the constitutional arguments and rejected them. The district court first held that the church had standing to raise the constitutional rights of the debtors in addition to its own. *Id.* at 950-51 (debtors could not effectively assert their free exercise rights because they are not parties in this proceeding). The district court then applied *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (Smith), and held that the church's free exercise claim failed on the merits because the Bankruptcy Code was a neutral law of general applicability which has only an incidental effect on religion. 152 B.R. at 953-54. The

district court held in the alternative that, even if the pre-*Smith* free exercise test applied, "[t]he government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling [governmental] interest." *Id.* at 954.

The district court also held that § 548(a) did not unfairly discriminate against religious contributions, *Id.* at 954, and that the debtors' "hybrid" right to free speech and free exercise was not impaired because limiting the amount an individual may contribute to a cause or organization only marginally restricts the contributor's ability to communicate that particular message. *Id.* The district court noted that § 548(a)(2)(A) was narrowly drawn and content-neutral, protected an important governmental interest in maximizing the debtors' estate, and did not violate the doctrine of separation of church and state. *Id.* at 954.

Finally, the district court held that § 548(a) did not violate the establishment clause. *Id.* at 955. The district court applied the *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), entanglement test and found that § 548 has a secular purpose, to maximize the size of the debtor's estate; its primary effect neither advances nor inhibits religion; and its enforcement does not threaten excessive entanglement between church and state. 152 B.R. at 955. The district court agreed with the bankruptcy court that attempting to quantify the value received by the debtors in exchange for their contributions to the church could lead to exactly the sort of entanglement the Constitution forbids. *Id.* This appeal followed.

CERTIFICATION OF CONSTITUTIONAL QUESTION

On November 13, 1993, after the district court had filed its decision and while this appeal was pending, President Clinton signed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.[2] For this reason, questions about the application of the RFRA (or its constitutionality) were not presented to the district court. Pursuant to the court's request, the parties filed supplemental briefs addressing the applicability of the RFRA.

While preparing for oral argument, this court recognized, albeit belatedly, that certification under 28 U.S.C. § 2403(a) was required because the appeal questioned the constitutionality of a provision of the bankruptcy code affecting the public interest and the United States was not a party. Accordingly, we removed the case from the argument calendar and certified the appeal to the Attorney General and invited the United States to intervene in the

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[2] The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, provides in part:

> (a) IN GENERAL – Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

appeal on the question of constitutionality of 11 U.S.C. § 548(a) if it so desired. *See* 28 U.S.C. § 2403(a); Fed.R.App.P. 44; Fed.R.Civ.P. 24(c). The parties had not requested the bankruptcy court, the district court or this court to notify the Attorney General, and the district court and the bankruptcy court had not realized that 28 U.S.C. § 2403 requires notification of the Attorney General whether or not it is requested by the parties. Nonetheless, "[f]ailure to notify the Attorney General is not a jurisdictional defect, and belated notice satisfies any requirement." *Tonya K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir.1988) (citations omitted). Certification has occurred even after judgment at the appellate level. *E.g., Merrill v. Town of Addison*, 763 F.2d 80, 83 (2d Cir.1985) (citing cases). "The rule is designed to give the Executive Branch both the time to make its views known and the opportunity to intervene in order to take a direct appeal to the Supreme Court if the decision should be adverse to the statute's constitutionality." *Tonya K. v. Board of Education*, 847 F.2d at 1247. No practical purpose would have been served in remanding the case to the bankruptcy court or the district court for purposes of certification, and the belated certification did not prejudice or otherwise impair the ability of the United States to fully present its views on the question of the constitutionality of § 548(a). *See Merrill v. Town of Addison*, 763 F.2d at 83.

Following certification, the United States decided to intervene in the case and filed a brief supporting the position of the trustee and defending the constitutionality of § 548(a)(2)(A) under both Smith and the RFRA. Several

amicus briefs were filed in support of the church's position.[3] Oral arguments were held in September 1994. However, immediately before oral argument, the United States ended its participation in the case as intervenor and withdrew its brief. The decision of the United States to withdraw surprised the parties and the court, but counsel for the trustee was substituted for the United States at the last moment and ably presented oral argument.

STANDARD OF REVIEW

We review the grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of identifying "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting

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[3] Amicus briefs were filed in support of the church on behalf of the Christian Legal Society, the National Association of Evangelicals, Americans United for Separation of Church and State, Concerned Women for America, the Baptist Joint Committee on Public Affairs, the Southern Baptist Convention, the General Conference of Seventh-Day Adventists, and the Evangelical Lutheran Church in America; the Church of Jesus Christ of Latter-Day Saints; and United States Senator Orrin G. Hatch.

Fed.R.Civ.P. 56(c)). Once the moving party has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings; rather, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Although we view the facts in the light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit.

In the present case, there are no genuine issues of material fact in dispute because the parties stipulated to the relevant facts and because the issues raise only questions of law.

The church's principal argument on appeal is that requiring the church to return these contributions violates the free exercise clause of the first amendment. The church relied on *Smith* in its main brief but also raised a RFRA compelling governmental interest argument in its supplemental brief. The church also argues that the district court erred in applying 11 U.S.C. § 548 to these contributions and in finding that the debtors did not receive "reasonably equivalent value" "in exchange" for their contributions to the church. We will discuss the statutory arguments first.

"FRAUDULENT" TRANSFERS UNDER 11 U.S.C. § 548(a)(2)

The section of the bankruptcy code under which the trustee recovered the contributions at issue, 11 U.S.C.

§ 548, is captioned "fraudulent transfers and obligations." As a preliminary matter, the church argues that this caption is not merely "unfortunate" but significant because the purpose of the section is to avoid transfers made with fraudulent intent or at least under circumstances under which a transfer may be considered fraudulent. The church argues that the section was not drafted with bona fide charitable contributions in mind and that in the present case there is no question of fraudulent intent. The church notes that the debtors did not change the frequency or amount or the recipient of their contributions in the face of their changing financial circumstances.

The term "fraudulent" in the caption of 11 U.S.C. § 548 is inapposite and, at least with respect to § 548(a)(2), can certainly be misleading. *In re Newman*, 183 B.R. 239, 245 & n. 9 (Bankr.D.Kan.1995). It may be, as the district court noted, that "describing the [debtors' contributions] as 'avoidable transfers' rather than 'fraudulent transfers' may be more appropriate because it lessens the [unwarranted] inference of culpability." 152 B.R. at 950. Fraudulent intent is not required to recover transfers made within one year of the bankruptcy filing under § 548(a)(2). *Compare* 11 U.S.C. § 548(a)(1) (under which fraudulent intent is required to avoid transfers). Section § 548(a)(2) requires only "constructive fraud," not actual intent to defraud. "A transfer is constructively fraudulent if an insolvent debtor transfers some of its property for less than reasonably equivalent value." *In re Newman*, 183 B.R. at 245 n. 9. In the present case the trustee has not accused the debtors and the church of any improper conduct, much less actual fraud. What is important, however, is not the misleading caption but that the trustee

was not required to prove actual fraud in order to recover the contributions under § 548(a)(2)(A). We next consider the church's substantive statutory argument.

In order to find a fraudulent transfer, or, more accurately, an avoidable transfer, has occurred under 11 U.S.C. § 548(a)(2), the trustee must prove by a preponderance of the evidence that (1) there was a transfer of an interest of the debtor in property, (2) the transfer was made within one year before the date of the filing of the petition, (3) the debtor was insolvent on the date the transfer was made, and (4) the debtor received less than a reasonable equivalent value in exchange for the transfer. 152 B.R. at 945 (citations omitted). In the present case the parties stipulated that the first three elements were satisfied, and the only issue was whether the debtors had received "reasonably equivalent value" "in exchange for" their contributions to the church. *Id.* As noted above, the district court concluded that the debtors' contributions were gratuitous transfers, *Id.* at 948, and that religious or spiritual support did not constitute "reasonably equivalent value." *Id.* at 949-50. The district court also concluded that, even assuming the church services did constitute "reasonably equivalent value," in the present case the church's services had not been provided "in exchange for" the debtors' contributions because the parties stipulated that the church services were available regardless of whether or not they made any contributions. *Id.*

On appeal the church argues the district court erroneously defined "value" to include only tangible property and ignored how the debtors valued what they received from the church. The church argues that "value"

includes indirect economic benefits and that the debtors received "value" in the form of tax deductions for charitable contributions, church membership and spiritual counseling, and, more concretely, access to church facilities because contributions from the debtors and others helped pay for the church's operating expenses. The church also argues that the district court erred in concluding that the contributions were not made "in exchange for" the indirect economic benefits the debtors received in the form of church services. The church argues a nexus existed between the contributions and those benefits because the debtors made the contributions during the same time period they received the benefits.

Title 11 U.S.C. § 548(d)(2)(A) defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or the relative of the debtor." In the present case it was undisputed that the church did not satisfy or secure a present or antecedent debt of the debtors; the only issue was whether the debtors received some sort of "property" or "property right," and therefore "value," from the church. The bankruptcy court decided that the debtors did not receive any economic benefit from the church services. 148 B.R. at 893-94. The bankruptcy court noted that although the debtors received substantial spiritual comfort from the church services, *id.* at 891 n. 7, the church services did not provide them, much less their pre-petition estates, with any "tangible or recognizable economic benefit," "marketable financial value or economic utility from a creditor's point of view." *Id.* at 894. We agree that the bankruptcy court over-emphasized the

financial or economic considerations in defining "value" under § 548. "[T]he requirement of economic benefit to the debtor does not demand consideration that replaces the transferred property with something else tangible or leviable that can be sold to satisfy the debtor's creditor's claims." 2 David G. Epstein, *Bankruptcy* § 6-49, at 23 (1992).

Unlike the bankruptcy court, however, the district court did not define "value" only in terms of tangible property or marketable financial value. The district court correctly examined "all aspects of the transaction and carefully measure[d] the value of all benefits and burdens to the debtor, direct or indirect," including "indirect economic benefits." 152 B.R. at 945. The district court required only that the indirect economic benefits be "fairly concrete." *Id., citing In re Minnesota Utility Contracting, Inc.*, 110 B.R. 414, 420 (D.Minn.1990) (*MUC*) (bank required corporation to grant bank a security interest in its assets to extend additional line of credit to a second corporation owned by same shareholders; indirect economic benefit to first corporation could be "reasonably equivalent value" as long as indirect economic benefit was "fairly concrete"; no evidence that first corporation received any indirect economic benefits). What "fairly concrete" means is not clear. However, the district court clearly did not define "property" in general, or "indirect economic benefit" in particular, only in terms of legal or equitable rights or ownership interest. *Compare* 148 B.R. at 891 (bankruptcy court arguably limited "property" to legal or equitable rights and things subject to ownership) *with id.* at 893-94 (value requires transfer of economic benefit to debtor's estate); *cf. In re Newman*, 183

B.R. at 247 (noting that tithing does not give debtors enforceable property right, contract right or equitable right to attend or partake in services offered by church).

In any event, in the present case, whether the debtors received any economic benefit from the church services is beside the point. Even assuming that the debtors received "reasonably equivalent value,"[4] the stipulated facts in the present case precluded any finding that the debtors made their contributions "in exchange for" the church services. 152 B.R. at 949, 148 B.R. at 893. Section 548 contemplates a quid pro quo. In the present case the parties' stipulations are inconsistent with a quid pro quo. The debtors stipulated that they made the contributions out of a sense of religious obligation and not in order to attend church (or receive a tax deduction). The parties also stipulated that the church services were available to all regardless of whether any contributions were made. In other words, the debtors' contributions were purely voluntary and in

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[4] Finding that the church services had some economic benefit and that the debtors made the contributions in exchange for those services would call into doubt treating those contributions as deductible charitable contributions. *See Hernandez v. Commissioner*, 490 U.S. 680, 690-91, 109 S.Ct. 2136, 2144-45, 104 L.Ed.2d 766 (1989) (charitable contributions are only deductible if made without adequate consideration; payments made to a religious organization in exchange for a benefit to the taxpayer, even a "purely religious" benefit, do not qualify as charitable contributions).

For purposes of analysis, we have also assumed that the contributions and the church services were reasonably equivalent and thus need not take up the constitutionally suspect and difficult task of attempting to value the church services.

no way linked to the availability of church services. Similarly, the church conducted worship services and provided other services independent of the debtors' contributions. Under the stipulated facts, there was no quid pro quo, no exchange of contributions for church services.[5]

Because the debtors did not receive the church services "in exchange for" their contributions, the contributions were avoidable transfers and were recoverable by the trustee under 11 U.S.C. § 548(a)(2).

FREE EXERCISE OF RELIGION

Having concluded that the debtors' contributions were avoidable transfers and recoverable by the trustee under bankruptcy law, we turn now to the church's first amendment arguments. The parties' arguments on the

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[5] In fact, as one would expect, given the religious context, the absence of any nexus between tithing and the availability of religious services is typical of the case law in this area. *See, e.g., In re Tessier*, 190 B.R. 396, 399 (Bankr.D.Mont.1995) (church would welcome and fully accept debtors without or without tithing); *In re Newman*, 183 B.R. 239, 248 (Bankr.D.Kan.1995) (noting that debtors would have tithed in same amount even if church reduced services and that church would have provided services to debtors even if they had reduced their tithe or not tithed at all); *In re Lees*, 192 B.R. 756, 758 (Bankr.D.Mont.1994) (no indication that debtors could no longer attend or would lose any privileges at church if reduced or eliminated tithing); *In re Packham*, 126 B.R. 603, 608 (Bankr.D.Utah 1991) (only speculation by debtors that the church would deny them a temple recommend if they failed to tithe). *But cf. In re Moses*, 59 B.R. 815, 818 (Bankr.N.D.Ga.1986) (contributions required as condition of debtor's employment by the church as a deacon).

merits are related and, to a certain degree, repetitive. Because we hold that requiring the church to return the debtors' contributions violates the RFRA, we do not reach the merits of the constitutional issues.

As noted above, even though the church did not raise any constitutional arguments in the bankruptcy court and raised them for the first time on appeal in the district court, the district court exercised its discretion to consider the constitutional arguments on appeal. The trustee argues that this is not the kind of extraordinary case that warrants an exception to the general rule that a reviewing court should not consider issues raised for the first time on appeal. *E.g., United States Trustee v. Harris*, 960 F.2d 74, 78 (8th Cir.1992). We hold that the district court did not abuse its discretion in considering the constitutional arguments raised by the church for the first time on appeal. The constitutional arguments raised by the church for the first time on appeal involved purely legal issues. No additional evidence or argument would have affected the outcome of the case. *E.g., Universal Title Insurance Co. v. United States*, 942 F.2d 1311, 1314-15 (8th Cir.1991).

STANDING

The trustee also argues the church lacks standing to raise the free exercise rights of the debtors, who were not parties in the adversary proceeding in bankruptcy court or on appeal in the district court (or on appeal in this court). We hold that the church has standing to raise the free exercise rights of the debtors. *See In re Newman*, 183 B.R. at 249. This issue involves the concept of third-party

standing. Standing is a jurisdictional prerequisite, and in general parties must raise their own legal rights. However, a litigant can raise the free exercise rights of a third party if the third party cannot effectively assert those rights. *McGowan v. Maryland*, 366 U.S. 420, 430, 81 S.Ct. 1101, 1107-08, 6 L.Ed.2d 393 (1961) (department store challenging Sunday closing law could not raise free exercise rights of patrons). We agree with the district court that the debtors could not have effectively asserted their free exercise rights. The trustee, representing the debtors' estates, and the church were the parties in this adversary proceeding; the debtors were not. As noted by the district court, there was no indication that the debtors were able to assert their free exercise rights in another forum. In addition, the interests of the church and the debtors, who are members of the church, were sufficiently similar so that the church would be an effective representative of the debtors' free exercise rights.

RETROACTIVE APPLICATION OF RFRA

Although the RFRA was enacted after the district court's decision, the RFRA provides that it "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." RFRA § 6(a), 42 U.S.C. § 2000bb-3(a). The RFRA defines the term "government" broadly to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." *Id.* § 5(1), 42 U.S.C. § 2000bb-2(1). The bankruptcy code is federal law, the federal courts are a branch of the United States, and our decision in the

present case would involve the implementation of federal bankruptcy law. We and other circuits have held that the RFRA applies retroactively in other contexts. *E.g., Hamilton v. Schriro*, 74 F.3d 1545, 1549 (8th Cir.1996); *Holterman v. Helling*, 70 F.3d 1276 (8th Cir.1995) (table); *Brown-El v. Harris*, 26 F.3d 68, 69 (8th Cir.1994); *see also Flores v. City of Boerne*, 73 F.3d 1352, 1355 (5th Cir.1996) (city historic preservation ordinance); *Droz v. Commissioner*, 48 F.3d 1120 (9th Cir.1995) (Social Security taxes), *cert. denied*, ___ U.S. ___, 116 S.Ct. 698, 133 L.Ed.2d 656 (1996). Bankruptcy courts in other jurisdictions have applied the RFRA retroactively. *See, e.g., In re Tessier*, 190 B.R. 396, 403 (Bankr.D.Mont.1995) (applying RFRA to protect tithing, but holding RFRA is unconstitutional); *In re Newman*, 183 B.R. at 251 (holding RFRA does not protect tithing).

RFRA

On the merits the church argues that requiring the return of these contributions unfairly discriminates against religion in general and, more specifically, against religions (and the members of those religions) that believe in tithing. The church argues that exempting a personal residence or tools of a trade or household goods, *see* 11 U.S.C. § 522(d), but not religious contributions discriminates against religion. The church also argues that requiring the return of contributions discriminates against religions on the basis of the way in which they are supported. Some religions, like the church, emphasize tithing; others rely upon personal services, contributions from the public, fees for services, donations, or membership dues. The church also argues that, even among those religions that rely upon donations, religions like the

church that encourage tithing at the traditional level of 10% are much more attractive to a trustee looking for potential assets than other religions. Brief for Appellant at 13 (table listing average % of household income donated to charity by denomination as 1.3 to 3.8%, much less than 10%).

For the reasons discussed below, we hold that the recovery of the contributions substantially burdens the debtors' free exercise of their religion and is not in furtherance of a compelling governmental interest and therefore violates the RFRA. In light of this holding and because the RFRA is more protective of the right of free exercise than *Smith*, *see, e.g.*, *Flores v. City of Boerne*, 73 F.3d at 1361 (describing RFRA as "a substantive expansion of First Amendment doctrine" and in effect "an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts – that is, strict scrutiny versus a form of intermediate scrutiny"), we need not consider whether the recovery of the contributions violates Smith. The parties did not raise the question of the constitutionality of the RFRA, and we do not consider the constitutionality of the RFRA. *See id.* at 1356-64 (holding Congress has authority under § 5 of fourteenth amendment to enact RFRA and RFRA does not usurp judiciary's power to interpret the Constitution). This circuit has applied the RFRA in other cases without questioning its constitutionality and thus has at least implicitly held that the RFRA is constitutional. *But cf. Hamilton v. Schriro*, 74 F.3d at 1557 (McMillian, J., dissenting) (arguing that the RFRA is unconstitutional because Congress does not have power under § 5 of the fourteenth amendment to enact RFRA);

Tessier, 190 B.R. at 405-07 (holding RFRA is inconsistent with *Smith* and violates the separation of powers doctrine).

In *Smith* the Supreme Court held that the first amendment's free exercise clause does not bar application of a facially neutral law of general application to religiously motivated conduct. 494 U.S. at 881, 110 S.Ct. at 1601. In *Smith* two members of the Native American Church claimed that the state unfairly denied them unemployment compensation because their religious use of peyote was determined to be misconduct. The Court held that the free exercise clause did not bar the state from prohibiting sacramental peyote use and therefore denying unemployment benefits to Native Americans discharged for using peyote. *Id.* at 890, 110 S.Ct. at 1606. The Court expressly rejected the application of the compelling governmental interest and least restrictive means test set forth in cases like *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), as unworkable and unnecessary in free exercise analysis. 494 U.S. at 885, 886-90, 110 S.Ct. at 1603-04, 1604-06. Justice Scalia explained that whereas application of the compelling governmental interest test in fields such as equal protection or free speech produces constitutional norms, in the free exercise context it produces a "constitutional anomaly," that is, a private right to ignore generally applicable laws. *Id.* at 886, 110 S.Ct. at 1604 (footnote omitted). Justice Scalia emphasized that " '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.' " *Id.* at 887, 110 S.Ct. at 1604, *citing Hernandez v. Commissioner*, 490 U.S. at

699, 109 S.Ct. at 2148. Justice Scalia cautioned that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." 494 U.S. at 887, 110 S.Ct. at 1604.

Concerned that *Smith* did not adequately protect free exercise rights, in 1993 Congress passed the RFRA expressly in response to *Smith*. Congress intended "to restore the compelling [governmental] interest test" as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), "to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b)(1), (2), "even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a).

The threshold inquiry under the RFRA is whether the governmental action in question "substantially burdens" a person's religious practice. This is a question of law which we review de novo. *Hamilton v. Schriro*, 74 F.3d at 1552. The individual has the burden of establishing the existence of substantial burden. 42 U.S.C. § 2000bb-1(a). "[T]he governmental action must burden a religious belief rather than a philosophy or a way of life. [T]he burdened belief must be sincerely held by the [person]." *Werner v. McCotter*, 49 F.3d 1476, 1480 n. 1 (10th Cir.) (citing *Wisconsin v. Yoder*, 406 U.S. at 215-19, 92 S.Ct. at 1533-35), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2625, 132 L.Ed.2d 866 (1995). In order to be considered a "substantial" burden, the governmental action must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious]

beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." *Werner v. McCotter*, 49 F.3d at 1480. Assuming for purposes of analysis that courts can constitutionally determine the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance, defining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with the RFRA's purpose to restore pre-*Smith* free exercise case law. *See Sasnett v. Sullivan*, 908 F.Supp. 1429, 1440-45 (W.D.Wis.1995) (extensive discussion of "substantial burden" requirement).

For purposes of analysis, we can assume that the recovery of these contributions would substantially burden the debtors' free exercise of religion. Even though the church encourages but does not compel tithing, the debtors consider tithing to be an important expression of their sincerely held religious beliefs. In other words, in the present case, tithing is religiously motivated, but not religiously compelled, practice. Permitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year immediately preceding the filing of the bankruptcy petitions. We do not think it is relevant that the debtors can continue to tithe or that there are other ways in which the debtors can express their religious beliefs that are not affected by the governmental action. It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than

minimal significance in a way that is not merely incidental. *Cf. In re Tessier,* 190 B.R. at 403-04 (debtors testified that even though church would not sanction them for failing to tithe, their faithful exercise of their religion is "contingent" upon their continuing to tithe; holding that not allowing debtors to tithe under Chapter 13 plan substantially burdens free exercise right; however, noting that Chapter 7 trustee may attack religious giving by bringing a fraudulent transfer action against the religious institution under 11 U.S.C. § 548(a), as was done in the present case, or by dismissing the Chapter 7 case for substantial abuse under 11 U.S.C. § 707(b)). *But cf. In re Newman,* 183 B.R. at 251 (recovery of tithes already paid does not substantially burden free exercise because it does not prevent debtors from continuing to tithe; no evidence that 11 U.S.C. § 548(a)(2) prevented debtors, or any other member of church, from fulfilling their personally-held religious obligation to tithe at any time).

The next question is whether there is a compelling governmental interest. Once the individual has shown that the governmental action substantially burdens his or her free exercise right, the government must demonstrate that the substantial burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). These are questions of law which we review de novo. *Hamilton v. Schriro,* 74 F.3d at 1552. The RFRA does not define "compelling governmental interest." Compelling governmental interests have been described in a post-Smith establishment clause case as "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113

S.Ct. 2217, 2233, 124 L.Ed.2d 472 (1993). However, pre-*Smith* case law is instructive. For example, *Hernandez v. Commissioner*, 490 U.S. at 699, 109 S.Ct. at 2148-49, held that the governmental has a compelling interest in maintaining the tax system. *United States v. Lee*, 455 U.S. 252, 258-59, 102 S.Ct. 1051, 1055-56, 71 L.Ed.2d 127 (1982), held that the government has a compelling interest in enforcing participation in the social security system. Case law has recognized a compelling governmental interest in maintaining national security and public safety, *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); *Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 441-42, 88 L.Ed. 645 (1944). *Wisconsin v. Yoder*, 406 U.S. at 213, 92 S.Ct. at 1532, held that the government has a compelling interest in providing public education. However, in *Sherbert v. Verner*, 374 U.S. at 406, 83 S.Ct. at 1795, the Court found no compelling governmental interest in preventing fraud in the unemployment compensation system. Cases applying the RFRA have held that the government has a compelling interest in enforcing participation in the social security system, *Droz v. Commissioner*, 48 F.3d at 1122-23, and in maintaining safety and security in prisons, *Hamilton v. Schriro*, 74 F.3d at 1554, and schools, *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir.1995) (ban on wearing of ceremonial knives on campus), as well as in providing public education, *Fleischfresser v. Directors of School District 200*, 15 F.3d 680, 690 (7th Cir.1994) (reading skills program described as anti-Christian).

In the present case the question is whether the bankruptcy code in general and § 548(a)(2)(A) in particular constitute a compelling governmental interest. The

trustee argues the bankruptcy code in general, and § 548(a)(2)(A) in particular, furthers the compelling governmental interests in allowing debtors to get a fresh start while at the same time protecting the interests of creditors by maximizing the debtor's estate. The bankruptcy cases decided under the RFRA are split. In *In re Newman*, 183 B.R. at 252, a case which, like the present case, involved an adversary proceeding brought by the Chapter 7 trustee to recover as fraudulent transfers under 11 U.S.C. § 548(a)(2) sums that the debtors had contributed to their church, the bankruptcy court concluded that § 548(a), and the Bankruptcy Code as a whole, served a compelling governmental interest. The Newman court specifically noted the important policies of allowing debtors to get a fresh start, treating creditors as fairly as possible, and the administration of the bankruptcy system, as well as the historical importance of recovery of fraudulent transfers to bankruptcy law. *Id. Cf. In re Navarro*, 83 B.R. 348, 353 (Bankr.E.D.Pa.1988) (pre-RFRA; administration of bankruptcy system and protection of legitimate interests of creditors are compelling governmental interests). The *Newman* court also found that 11 U.S.C. § 548(a)(2) was the least restrictive means of furthering the compelling governmental interest. 183 B.R. at 252.

In comparison, the bankruptcy court in *In re Tessier*, 190 B.R. at 405, found no compelling governmental interest. However, *In re Tessier* arguably interpreted the compelling governmental interest requirement more narrowly than *In re Newman* to include in the free exercise context "only those interests pertaining to survival of the republic or the physical safety of its citizens." *Id. In re Tessier* is

procedurally distinguishable from the present case because it involved a Chapter 13 trustee's objection to the debtors' reorganization plan. Nonetheless, it is substantively similar to the present case because the trustee objected to the debtors' charitable contribution of $100 per month to their church, in other words, a tithe. The *Tessier* court acknowledged that "the government clearly has interests in . . . providing the debtor with a fresh start, efficiently administering bankruptcy cases, [and] protecting the interests of creditors," but concluded that such interests fell "short of direct national security and public safety concerns." *Id.* The *Tessier* court concluded that these interests, although "rational, and even important," were "not sufficiently grave to deserve the 'compelling' label when balanced against a parishioner's free exercise of religion." *Id., citing Sherbert v. Verner*, 374 U.S. at 406, 83 S.Ct. at 1795 (the key compelling governmental interest case which rejected the government's claim that preventing fraud in unemployment compensation was a compelling governmental interest). The *Tessier* court then held that the RFRA was unconstitutional, and thus had no effect on the bankruptcy code, because its restoration of the substantial burden/ compelling governmental interest test was inconsistent with *Smith's* "valid and neutral law of general applicability" test for free exercise claims and violated the separation of powers doctrine. 190 B.R. at 405-07.

We agree with *In re Tessier* that the interests advanced by the bankruptcy system are not compelling under the RFRA. Although we would not necessarily interpret compelling governmental interests as narrowly as the *Tessier* court did, we agree that bankruptcy is not comparable to

national security or public safety. We also agree that allowing debtors to get a fresh start or protecting the interests of creditors is not comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system, which have been recognized as compelling governmental interests in the face of a religious exercise claim. *See, e.g., Droz v. Commissioner*, 48 F.3d at 1122-24. Moreover, we cannot see how the recognition of what is in effect a free exercise exception to the avoidance of fraudulent transfers can undermine the integrity of the bankruptcy system as a whole; its effect will necessarily be limited to the debtor's creditors, who will as a result have fewer assets available to apply to the outstanding liabilities, and not all creditors or even all debtors. This is not to say that the recognition of a free exercise exception under these circumstances may not have adverse economic consequences for both creditors and debtors; for example, creditors may be more cautious in doing business with those who tithe or make contributions to religious organizations.

Because we hold that allowing debtors a fresh start and protecting the interests of creditors are not compelling governmental interests under the RFRA, we need not reach the question of whether the governmental action is the least restrictive means of furthering the compelling governmental interest.

In sum, we hold that because the substantial burden on the debtors' free exercise of religion is not furthered by a compelling governmental interest, the RFRA provides a defense against the order of the district court permitting the trustee to avoid the debtors' contributions

to the church under 11 U.S.C. § 548(a)(2)(A). The trustee is not entitled to recover $13,450 from the church.

Accordingly, the order of the district court is reversed.

BOGUE, Senior District Judge, dissenting.

While I agree with the majority's holding that the debtors did not receive reasonably equivalent value in exchange for the debtor's financial contributions to the church, I cannot agree with the decision on the merits under RFRA[1], and therefore respectfully dissent.

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[1] I understand that the constitutionality of RFRA is not before us as this case is currently postured. That notwithstanding, I feel compelled to note the unusual specter of employing the analytical framework of RFRA, where the author of the majority opinion has indicated his belief that RFRA is unconstitutional. *Hamilton v. Schriro*, 74 F.3d 1545, 1557 (8th Cir.1996)(McMillian, J., dissenting). Having reviewed and studied the author's thorough opinion in *Hamilton*, I am inclined to agree with his position. Further, cases relied on by the majority, regardless of the resolution on some issues, have ultimately found RFRA to be unconstitutional. *In re Tessier*, 190 B.R. 396, 406-07 (Bankr.D.Mont.1995). The constitutionality issue is particularly relevant in that employing RFRA, as opposed to the analysis under *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), "caused" the reversal in the current case, at least as I understand the *Smith* case. Put another way, "but for the passage of RFRA, the [church] could not have succeeded on [its] free exercise challenge to [11 U.S.C. § 5489(a)(2)]." *Hamilton*, 74 F.3d at 1561 (acknowledging that pre-RFRA standards were much less onerous as far as the government was concerned).

Given the statute's dubious constitutionality, I believe we should have requested supplementary briefing and hearing, along with certification to the Attorney General, on the constitutionality of RFRA.

The first step in RFRA analysis requires the plaintiff to establish that the challenged government action "substantially burdens" their free exercise of religion. If there is no substantial burden, the inquiry ends and the challenger's petition must fail. *In re Newman*, 183 B.R. 239, 251 (Bankr.D.Kan.1995) ("If there is no substantial burden, RFRA does not apply."). Courts have articulated various standards required to make a showing of substantial burden.

I agree with the majority that RFRA does not compel the church to show that tithing is "required" by the church in order to prove a substantial burden. It is enough if the allegedly impinged conduct is motivated by a sincerely held religious belief. *Sasnett v. Sullivan*, 908 F.Supp. 1429, 1444 (rejecting a "religiously mandated" test in favor of a "religiously motivated" test for purposes of determining substantial burden).[2] That being said, it is important that the substantial burden step in the RFRA analysis is not reduced to a perfunctory determination or foregone conclusion. A searching inquiry is required to "protect[ ] the government from having to justify its regulations under a compelling interest standard if the burden on the asserted practice is incidental or de minimis." *Id.*

As stated by the majority, the governmental action must "significantly inhibit or constrain conduct or

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[2] I also share the majority's concern as to whether courts can constitutionally determine "the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance. . . ." Op. at 1418.

expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." Op. at 1418. Although it is undisputed that the debtors sincerely believe in tithing and that tithing is central to the religion they practice, I would conclude that the trustee's action of recovering monies tithed during the year the debtors were insolvent does not substantially burden the free exercise of their religion.

In coming to this conclusion, I note that the act of tithing by the debtors in the year preceding their filing for Chapter 7 protection was in fact executed, i.e., regardless of the eventual outcome, they were given the opportunity to practice their religion as they chose during the year they were insolvent. There was no *"constraint of conduct* or expression" respecting a central tenet of their belief, nor a curtailment of their ability to *"express adherence"* to their faith, nor were they denied reasonable opportunities to *"engage in those activities"* that were fundamental to their religion. They engaged in the conduct and activity of tithing and fully expressed adherence in their sincere belief in tithing to the church. Unfortunately, the debtors were insolvent during the year preceding February 1992 when they filed a joint Chapter 7 bankruptcy petition. As such the trustee properly sought to recover that for which the debtors did not receive reasonably equivalent value in exchange for their contributions to the church.

The trustee's act of recovering the tithes from the church under 11 U.S.C. § 548(a)(2) does not change the fact that the debtors did all they could in the way of expressing and practicing their religious beliefs. I agree with the court in *In re Newman*, which reasoned:

> there is no evidence that section 548(a) prevents the debtors or any other church member from tithing. Indeed, the present record certainly does not suggest that section 548 prevented these debtors from tithing. Equally important, the church has no records which might show that other members did not tithe because of section 548 since no one ever checks to see if members actually do tithe. The funds the trustee seeks to recover *have already been tithed to the defendant*. The debtors, in all likelihood, continue to tithe to the defendant. *The debtors fulfilled their religious obligation by tithing in the year prior to their bankruptcy filing*. The statute, by its own operation, does nothing to prevent the debtors' fulfillment of their personally held religious obligation to tithe and, therefore, does not place a "substantial burden" on the debtors' practice of their religion.

In re Newman, 183 B.R. at 251 (emphasis added).[3]

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[3] It cannot be denied that the work of religious organizations may be more important now than ever before. Contributing, financially or otherwise, to further the mission of a religious organization is a laudatory practice. That being said, religious contributions cannot be considered beyond reproach or regulation in all circumstances. *United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982) (" . . . every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs.

Further evidence of the lack of substantial burden is the uncontroverted fact that tithing is not required to fully participate in church services. As noted by the majority, the parties have stipulated that church services were available to all persons regardless of whether any contributions were made. The fact that the debtors' purely voluntary tithes were ordered retroactively recovered by the trustee does not change the fact that the debtors can attend church services, participate in church programs, and worship and believe as they choose. They can continue to tithe as has been their custom, assuming no additional bankruptcy filings. Given these facts, I cannot conclude the debtor's free exercise of religion was substantially burdened.

In my view, the church's failure to demonstrate a substantial burden would end the inquiry and would require affirmance. Yet even if section 548 worked a substantial burden on the debtors' religious practice, I would conclude that the statute serves a compelling governmental interest and is the least restrictive means of achieving said interest.

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."). The debtors should be commended for their commitment to contributing to the church. There is no dishonor in the fact that the tithes they offered during insolvency ought to be recovered by the trustee. The reality is that the tithed money should be part of the estate available to creditors, who in good faith, advanced money, goods or services to the debtors upon the condition of repayment.

Although stated in dicta, I agree with the district court's view that the bankruptcy code and § 548(a)(2)(A) furthers the compelling governmental interest in allowing debtors to get a fresh start while at the same time protecting the interests of creditors by maximizing the debtor's estate. *In re Young*, 152 B.R. 939, 954 (D.Minn. 1993); accord *In re Newman*, 183 B.R. at 252 ("Section 548(a), and the Bankruptcy Code as a whole, serve a compelling governmental interest."); *In re Navarro*, 83 B.R. 348, 353 (Bankr.E.D.Pa.1988) (the "administration of the bankruptcy system and protection of the legitimate interests of creditors" serves a compelling governmental interest).

It can be fairly said that our nation's economy depends extensively on the availability of credit to individuals and businesses. Bankruptcy is an extraordinary remedy for insolvent debtors and oftentimes harsh on creditors. One of the creditor's few protections are recovery statutes like section 548, which as of today includes a free exercise exception for religious giving in the year preceding filing for bankruptcy.

The majority may be correct when it admonishes that today's decision may not, by itself, undermine the integrity of the bankruptcy system as a whole. But I share the majority's apprehension that credit transactions involving persons with views similar to the current debtors may hereinafter involve a more probing and delicate inquiry. Given today's holding, are cautious potential creditors (including government or government-sponsored creditors) now expected to question applicants in depth regarding the highly personal activity of religious giving? And what if said application is denied on the grounds that the applicant's religious giving makes extending

credit an unwarranted risk? Pragmatic issues aside, it is enough that all of society has a compelling interest in maintaining the balance between debtors and creditors in its current state.

Finally, I would find that section 548(a)(2) is the least restrictive means of furthering the above-articulated compelling interest. Like the present action, *In re Newman* also involved a trustee's attempted recovery of tithed funds under 11 U.S.C. § 548(a)(2). In finding that section 548(a)(2) passes the least restrictive means test, the court noted:

> The portion of the statute at issue in this case only allows for recovery those transfers of the debtor's property which occurred within one year of the bankruptcy filing, occurred while the debtor was insolvent, and that were not given in exchange for reasonably equivalent value. Clearly, the statute was drawn in such a way as to balance the ability of the debtor to dispose of property with the need to protect unsecured creditors. For example, if in this case the debtors had not been insolvent on the dates that the transfers to the defendant took place, then the transfers would not be recoverable. Only when all of the requirements of § 548(a)(2) are met is the trustee able to recover the transfer.

In re Newman, 183 B.R. at 252.

The statute contains four specific elements, all of which are satisfied by the trustee in this case. The statute is narrowly tailored, and the trustee closely followed the proper procedures set forth in the Bankruptcy Code for avoiding and recovering the donations, and took no

action against these debtors which would not be taken against any other transferee in the same factual situation.

In conclusion, I would hold that the trustee has satisfied the requirements of RFRA and would affirm the district court.

In re Bruce YOUNG.
In re Nancy YOUNG.
Julia A. CHRISTIANS, Appellee,
United States of America, Intervenor,

v.

CRYSTAL EVANGELICAL FREE CHURCH,
Appellant.

No. 93-2267.

United States Court of Appeals,
Eighth Circuit.

June 27, 1996.

Appeal from the United States District Court for the District of Minnesota; Harry H. MacLaughlin, Judge.

Prior Report: 82 F.3d 1407 (8 Cir.1996).

Kenneth Corey-Edstrom, Brooklyn Center, MN, argued, for appellant.

Douglas Laycock, Austin, TX, argued, for amici curiae.

Richard Thomas Thomson, Minneapolis, MN, argued, for appellee.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

BEAM, Circuit Judge, specially concurring in the denial of the petition for rehearing en banc.

Although I generally agree with the ultimate disposition of this case, I want to emphasize that the court's decision cannot mean that all religious contributions by a bankruptcy debtor constitute a preferential transfer under the Bankruptcy Code. The court holds that even assuming the Youngs received some reasonably equivalent value from church services, they did not make their contributions "in exchange for" church services. While that may be true on the facts of this case, it would certainly not be true in the context of many religious contributions. For example, the United States Supreme Court has held that contributions to the Church of Scientology were in exchange for "an identifiable benefit, namely, auditing and training sessions" and thus were not tax deductible charitable contributions. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 691, 109 S.Ct. 2136, 2144-45, 104 L.Ed.2d 766 (1989). Moreover, in some synagogues, attendance at worship services for Jewish High Holy Days is predicated upon the purchase of a ticket or a reserved seat. See, e.g., id. at 709, 109 S.Ct. at 2153-54 (O'Connor, J., dissenting). Another example is the rule that Mormons must tithe ten percent of their gross income as a precondition to receiving a "temple recommend" – i.e., attending services and praying at the Central Church in Salt Lake City, Utah. See In re Bien, 95 B.R. 281 (Bankr.D.Conn.1989); see also Hernandez, 490 U.S. at 709, 109 S.Ct. at 2153-54. As a final example, Roman Catholics can make a fixed payment in the form of a Mass stipend to a priest, who in turn conducts a Mass for the intention of the donor. See Hernandez, 490 U.S. at 709, 109 S.Ct. at 2153-54. Therefore, the court's conclusion that church services were not provided "in exchange for"

the debtors' tithing would fail to resolve the instances when religious contributions are directly linked to certain benefits.

The court's analysis may also prove too rigid in the sense that even when a religion does not expressly require a monetary contribution as a precondition to receiving a benefit, a practitioner may feel compelled to contribute to their religious organization in order to qualify for the services or to be a member in good standing. While a particular religion or church might not expressly require a contribution, many religious institutions would be incapable of providing services without contributions by their members. In some instances, therefore, but for their members' contributions, religious institutions might not be able to provide any services. For these reasons, the court's discussion of the "in exchange for" language may, in many instances, prove to be problematic and ill advised.

Finally, because the court's analysis assumes that the debtors received "reasonably equivalent value" for their contributions, it leaves unresolved whether religious services constitute "value" under the Bankruptcy Code. Clearly, the courts should refrain from placing a monetary value on the spiritual benefits gained from a certain religion. Our inability to assign a precise dollar amount to these benefits, however, does not mean that no value is received. In some situations it would not be difficult to attach a dollar figure to services provided by a church – e.g., calculating a tuition waiver (or credit) to parochial school given to contributing church members where non-members pay tuition. In other instances, contributors

receive services which have a value (e.g., counseling sessions, facility maintenance), but the bankruptcy trustee may not be able to meet its burden of establishing that the debtor contributed more than the reasonably equivalent value of those services because the trustee has difficulty attaching a monetary amount to the value of the services received. See In re Moses, 59 B.R. 815, 818 (Bankr.N.D.Ga.1986); Wilson v. Upreach Ministries, 24 B.R. 973, 979 (Bankr.N.D.Tex.1982). Therefore, situations exist in which a religious contribution by a bankruptcy debtor would not constitute a preferential transfer under the Bankruptcy Code. Because as I read it, the court's opinion does not foreclose such a conclusion, I specially concur in the court's decision to deny the bankruptcy trustee's petition for rehearing en banc.

In re Bruce YOUNG and Nancy Young, Debtors.

Julia A. CHRISTIANS, Trustee, Plaintiff,

v.

CRYSTAL EVANGELICAL FREE CHURCH, Bruce Young, and Nancy Young, Defendants.

Bankruptcy No. 4-92-871.
Civ. No. 4-93-76.
Adv. No. 4-92-157.

United States District Court,
D. Minnesota,
Fourth Division.

April 14, 1993.

Julia A. Christians, Lapp, Laurie, Libra, Abramson & Thomson, Minneapolis, MN, trustee.

Kenneth Corey-Edstrom, Henningson & Snoxell, Brooklyn Center, MN, for defendant Crystal Evangelical Free Church.

MEMORANDUM AND ORDER

MacLAUGHLIN, District Judge.

This matter is before the Court on defendant Crystal Evangelical Free Church's appeal of the bankruptcy court's[1] order granting summary judgment in favor of

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[1] The Honorable Chief Judge Robert J. Kressel, United States Bankruptcy Court for the District of Minnesota.

plaintiff Julia A. Christians, the trustee. The bankruptcy court's order will be affirmed.

FACTS

The parties stipulated to the following facts. Bruce and Nancy Young (debtors) filed a Chapter 7 bankruptcy petition on February 3, 1992. Plaintiff Julia A. Christians is the trustee in their case. In the year immediately preceding the debtors' filing, debtors contributed a total of $13,450 to defendant Crystal Evangelical Free Church. Debtors were insolvent at the time the contributions were made. In addition to their financial contributions, debtors held a variety of volunteer positions in the church. At no time did the church require debtors to pay any membership or attendance fee, but the church does teach that people should make regular financial contributions.

The trustee brought an adversary proceeding seeking to recover the contributions as "fraudulent transfers" within the meaning of the Bankruptcy Code. The trustee and the church both moved for summary judgment. The bankruptcy court granted the trustee's motion and denied the church's motion. *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886, 897 (Bankr.D.Minn.1992). The church appeals.

DISCUSSION

I. *Summary Judgment Standard*

The Court reviews de novo the bankruptcy court's grant of summary judgment. *McKee v. Federal Kemper Life Assur. Co.*, 927 F.2d 326, 328 (8th Cir.1991); *Steven v. Pike*

County Bank, 829 F.2d 693, 695 (8th Cir.1987). A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir.1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." *AgriStor Leasing*, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir.1987), *cert. denied*, 484 U.S. 1010, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

II. *Overview*

The parties raise several issues. Initially, the Court must determine whether, as a matter of statutory interpretation, the bankruptcy court correctly concluded that debtors did not receive "reasonably equivalent value in exchange for" the contributions. If the Court concludes that the bankruptcy court correctly interpreted the statute, the church requests that the Court analyze whether that interpretation of the statute violates the Free Exercise Clause or Establishment Clause of the Constitution. The constitutional analysis can be divided into three stages. First, the Court must decide whether to allow the church to raise constitutional arguments for the first time on appeal. Second, if the Court allows the church to raise those arguments, the Court must decide whether the church has standing to raise constitutional objections on behalf of debtors. Third, if the Court concludes that the church has standing, the Court must then address the merits of the church's constitutional arguments.

III. *Fraudulent Transfers Under the Bankruptcy Code*

A. *Applicable Law*

The first issue before the Court is whether the contributions to the church were avoidable transfers within section 548 of the Bankruptcy Code. Section 548 provides in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before

> the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> . . . .
>
> (2)(A) received less than a *reasonably equivalent value in exchange for* such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation. . . .

11 U.S.C. § 548(a) (emphasis added). For the Court to find that a fraudulent transfer occurred, the trustee must prove the following:

> 1. there was a transfer of an interest of the debtor in property;
>
> 2. the transfer was made within one year before the date of the filing of the petition;
>
> 3. the debtor was insolvent on the date the transfer was made; and
>
> 4. the debtor received less than a reasonable equivalent value in exchange for the transfer.

First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.), 110 B.R. 414, 417 (D.Minn.1990). The parties stipulated that the first three elements were satisfied; the only issue is whether the debtors received "reasonably equivalent value in exchange for" the contributions. *Christians*, 148 B.R. at 890.

In determining whether the debtors received reasonably equivalent value, the Court must examine all aspects

of the transaction and carefully measure the value of all benefits and burdens to the debtor, direct or indirect. *Pembroke Develop. Corp. v. Commonwealth Savings & Loan Assoc. (In re Pembroke Develop. Corp.)*, 124 B.R. 398, 400 (Bankr.S.D.Fla.1991). In other words, a determination of whether the debtor received reasonably equivalent value depends on the facts and circumstances of each case. *Minnesota Utility*, 110 B.R. at 419; *Joshua Slocum, Ltd. v. Boyle (In re Joshua Slocum, Ltd.)*, 103 B.R. 610, 618 (Bankr.E.D.Pa.), *aff'd*, 121 B.R. 442 (E.D.Pa.1989). The burden is on the trustee to establish that debtors did not receive reasonably equivalent value. *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 650 (3d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1476, 117 L.Ed.2d 620 (1992); *Minnesota Utility*, 110 B.R. at 417-19.

The Court has previously addressed the issue of what constitutes reasonably equivalent value. In *Minnesota Utility*, a bank extended Minnesota Utility Contracting, a closely-held corporation, a revolving line of credit that was secured by assets of Minnesota Utility. Later, the bank agreed to extend additional credit to Minnesota Utility but only if another closely- held corporation, MUC Leasing, which was owned by the same shareholders that owned Minnesota Utility, granted the bank a security interest in its assets. Both Minnesota Utility and MUC Leasing filed for bankruptcy within one year of the extension of additional credit. The issue was whether MUC Leasing had received reasonably equivalent value for the security interest it granted the bank. The bankruptcy court held that indirect benefits, under certain circumstances, may constitute reasonably equivalent value but

that there was no evidence that MUC Leasing received any indirect benefits.

On appeal, the Court stated that "[i]n determining whether a debtor has received fair consideration for the transfer, the Court should consider the purpose of the requirement, which is to conserve the debtor's estate for the benefit of creditors." *Id.* at 420. The Court then held that while indirect benefits could constitute reasonably equivalent value under some circumstances, the benefits received must be "fairly concrete." *Id.* The Court affirmed the bankruptcy court's order because there was no evidence in the record that MUC Leasing received "fairly concrete" indirect benefits.

B. *The Bankruptcy Court's Order*

The bankruptcy court described the analysis as two-fold. Did the debtors receive "value?" If so, was that "value" given "in exchange for" the contributions? In addressing the question of whether debtors received "value," the bankruptcy court looked to the statutory definition of that term. For the purposes of section 548 –

> "value" means *property*, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.

11 U.S.C. § 548(d)(2)(A) (emphasis added). Because the church did not satisfy or secure a present or antecedent debt of the debtors in exchange for the donations, the bankruptcy court refined the inquiry to address whether

the debtors received "property" in return. 148 B.R. at 890-93.

Based on the following reasoning, the bankruptcy court held that the debtors did not receive "property." First, relying on dictionary definitions of the term "property," the bankruptcy court concluded that property consists of rights and things subject to ownership. *Id.* at 891. Second, based on this definition, the bankruptcy court rejected the church's argument that debtors received "property" in the form of religious services, theological programs, and access to the premises. *Id.* "The debtors did not receive legal or equitable rights nor did they obtain any ownership interest from their contributions." *Id.* Third, the bankruptcy court concluded that the contributions did not yield "value" because they were economically detrimental to the debtors' financial estate. *Id.* at 893. The bankruptcy court found that "it was the debtors individually and not their pre-petition financial estate or their post-petition bankruptcy estate that received any benefit." *Id.* Fourth, the bankruptcy court bolstered its conclusion that the church's services were not "property" by asserting that the Establishment Clause might prevent a court from placing a value on those services, a task the court would be required to perform to determine whether the value received was reasonably equivalent to the contributions. *Id.* at 894.

The bankruptcy court then assumed, arguendo, that the debtors did receive "value" from the services of the church. The bankruptcy court held that any "value" the debtors received was not "in exchange for" their contributions. *Id.* at 895. The bankruptcy court noted that the church welcomes all members to worship regardless of

the size of contribution. The court found that the services offered by the church were in no way linked to the debtors' contributions. The bankruptcy court also looked to the Internal Revenue Code for guidance. The court concluded that under the Internal Revenue Code payments made to a religious organization in exchange for a quid pro quo are not deductible. 26 U.S.C. § 170(c)(4); *Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989). Finding that the church's argument that the debtors received services "in exchange for" the contributions called into question the right of all members to deduct donations, the bankruptcy court held that the same contribution that qualifies for a deduction under the Internal Revenue Code cannot also be "in exchange for" "value" under the terms of the Bankruptcy Code. 148 B.R. at 895.

Finally, the bankruptcy court was sharply critical of two cases finding that religious contributions were not avoidable under section 548. In *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr.N.D.Ga.1986), it was undisputed that the debtors had transferred $4,733.50 to their church in the year preceding the filing of their bankruptcy petition and the transfers took place while the debtors were insolvent. One of the debtors served as a deacon at the church and was required to tithe as a holder of that office. The trustee sought to recover the contributions as fraudulent transfers. The bankruptcy court found that the issue was solely one of statutory interpretation. The bankruptcy court recognized that in order for the services to constitute "value," the court first had to find that the services

constituted "property." The bankruptcy court held that the debtors received "property" based on the following reasoning. First, the bankruptcy court concluded that because the church required the contributions as a condition of one of the debtor's employment as a deacon, the contributions could be directly tied to the monetary compensation and benefits he received through his employment by the church. Second, the court found that the debtors received valuable services including marriage counseling and theological education. Third, the court found that the church provided heating, air conditioning, and electrical services for the debtors' comfort during the services they attended and those utility services could constitute exchangeable value. In the end, the bankruptcy court held that the trustee failed to meet his burden of proof because he did not offer adequate evidence that the debtors received less than a reasonably equivalent value in exchange for the contributions.

In reaching its decision in the case at bar, the bankruptcy court was very critical of the *Ellenberg* court. The bankruptcy court stated that *Ellenberg*'s conclusion that services provided by a church could constitute "property" violated the plain language of the statute. *Christians,* 148 B.R. at 896. The bankruptcy court also charged the *Ellenberg* court with neglecting to address the issue of whether the services provided by the church were "in exchange for" the contributions. *Id.* at 895-96. In short, the bankruptcy court concluded that the *Ellenberg* court ignored the statutory language in order to reach the "right" result. *Id.* at 896.

The bankruptcy court was also critical of a case on which the *Ellenberg* court relied. In *Wilson v. Upreach*

Ministries (In re Missionary Baptist Found. of Am.), 24 B.R. 973 (Bankr.N.D.Tex.1982), the debtor was the Missionary Baptist Foundation of America (MBFA), a nonprofit corporation which donated money to Upreach Ministries, another nonprofit corporation, within one year of MBFA filing for bankruptcy. There was no doubt that MBFA was insolvent at the time the contributions were made. After the bankruptcy court pointed out that a finding of fraudulent intent was not necessary, the court nevertheless felt it was relevant to highlight the fact that there were no "badges of fraud" in that case. The bankruptcy court held that whether the challenged transfer was for "reasonably equivalent value" was largely a question of fact and considerable latitude should be afforded to the finder of fact. The court concluded that "reasonably equivalent value" did not require that a monetary equivalent be received in exchange. The bankruptcy court held that the "good will" MBFA received in return for the contributions satisfied the "reasonably equivalent value" requirement and the contributions could not be recovered as fraudulent transfers.

In the instant case, the bankruptcy court criticized *Upreach Ministries* for the same reasons it criticized *Ellenberg*. The bankruptcy court stated that equating "good will" with intangible property which could provide "reasonably equivalent value" ignored the plain language of the Bankruptcy Code. *Christians*, 148 B.R. at 896. The bankruptcy court sympathized with the desire to do what "feel[s] right," but charged the *Upreach Ministries* court with willingly ignoring the statutory language in order to reach that result. *Id.*

C. *The Parties' Arguments*

The church argues that the bankruptcy court improperly construed section 548. The church begins by arguing that the bankruptcy court disregarded the canon of statutory interpretation that a statute should not be construed in a fashion that raises constitutional issues if another reasonable construction is available. The church asserts that Congress must clearly express an affirmative intention to regulate religious conduct before a statute should be interpreted in a way that interferes with the Establishment Clause and Free Exercise Clause of the First Amendment. The church argues that Congress did not intend section 548 to regulate religious conduct.

Next, the church argues that the bankruptcy court failed to consider the purpose of section 548. The church argues that the title of the statute, "Fraudulent transfers and obligations," indicates that Congress was concerned with unscrupulous creditors and not bona fide charities. The church asserts that because neither the church nor the debtors intended to defraud creditors, the purpose of section 548 does not apply in this case.

The church also argues that debtors received "value" in return for their contributions for several reasons. First, the church attempts to distinguish *Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989), which held that any quid pro quo received in return for a contribution renders the contribution non-deductible, by asserting that the different purposes of the Internal Revenue Code and the Bankruptcy Code allow a finding that debtors

received "value" in return for their charitable contributions. Second, the church argues that a tax deduction for charitable contributions is "value" received for the purposes of the Bankruptcy Code. Third, the church claims that the spiritual counseling provided for debtors constituted "value." Fourth, the church argues that the debtors' donations allowed the church to pay operating expenses including electricity, heat, and air conditioning, and that debtors received "value" from those utilities while they were at the church. The church contends that there is no requirement in section 548 that the debtor be the only person to receive value or that others cannot enjoy benefits at the same time.

The church also objects to the bankruptcy court's conclusion that even if the debtors did receive "value," it was not "in exchange for" their donations. The church argues that the spiritual counseling, educational, and worship services were provided during the general time frame during which the donations were made and thus were "in exchange for" those services. The church also argues that the debtors received a tax deduction "in exchange for" the donations.

The trustee responds to most of the church's arguments by directing the Court's attention to the reasoning adopted by the bankruptcy court. In short, the trustee first argues that a finding that the debtors received "value" requires a finding that they received "property," and that debtors received no property in this case. Second, the trustee argues even if the debtors received "value," it was not "in exchange for" their contributions. Third, the trustee argues that a finding that the services provided by the church constituted "value" would force

the bankruptcy court into the impossible position of having to place a dollar value on those services in order to determine whether they were of "reasonably equivalent value" to the contributions. Finally, the trustee objects to the church's argument that a tax deduction was "value" received "in exchange for" the contributions on the grounds that the argument is being raised for the first time on appeal.

D. *Analysis*

The Court finds that the bankruptcy court adopted the proper analytical framework and interpreted section 548 correctly. There are two issues: (1) did the debtors receive "reasonably equivalent value" for their contributions, and if so (2) were the contributions given "in exchange for" that "value."

1. *Did Debtors Receive "Reasonably Equivalent Value"?*

The Court concludes that debtors did not receive "reasonably equivalent value," within the meaning of the Bankruptcy Code, for their contributions. "Value" is defined by the Bankruptcy Code. "Value" must be either "property, or satisfaction or securing of a present or antecedent debt." 11 U.S.C. § 548(d)(2)(A). The parties agree that the key issue is whether debtors received some sort of property right. The Court finds that they did not. Debtors stipulated that they could have taken advantage of the services offered by the church regardless of whether they made any financial contributions, but that the church encouraged regular donations. In other words,

debtors made the contributions out of a "sense of religious obligation." Appellant's Mem. at 13. A debtor cannot receive reasonably equivalent value for payments that are made out of a sense of moral obligation rather than legal obligation. *See Whitlock v. Hause (In re Hause)*, 13 B.R. 75, 79 (Bankr.D.Mass.1981). Moreover, emotional support received in exchange for a transfer, without more, cannot satisfy the requirement for reasonably equivalent value. *Walker v. Treadwell (Matter of Treadwell)*, 699 F.2d 1050, 1051 (11th Cir.1983). "The object of section 548 is to prevent the debtor from depleting the resources available to creditors through gratuitous transfers of the debtor's property." *Id.* Charitable contributions are clearly gratuitous transfers, despite the fact that debtors feel morally obligated to tithe. Strictly as a matter of statutory interpretation, there are no justifiable grounds to differentiate between religious donations and other gratuitous transfers, such as gifts to family members, which are clearly avoidable. *Walker*, 699 F.2d at 1051.

The Court concludes that the church's argument that the tax deduction debtors received for the contributions was "reasonably equivalent value" is also unpersuasive. The ability to deduct an amount of money from gross income cannot, in economic terms, be of "reasonably equivalent value" to that same amount in cash that has been removed from the estate. *See Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201, 203 (5th Cir.1980) (establishing rule that any transfer for less than 70 percent of market value of the property is per se not reasonably equivalent value).

Finally, the bankruptcy court was correct to look to Supreme Court precedent in connection with the Internal

Revenue Code for assistance. In *Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989), the Supreme Court addressed the issue of whether fixed-level donations to a religious organization can be deducted from taxable income when specific services are provided by the religious organization in return for the fixed donation. The Court found that a quid pro quo analysis was appropriate. *Id.* 490 U.S. at 691, 109 S.Ct. at 2145. The Court held that a charitable contribution is deductible only if it is without adequate consideration. *Id.* 490 U.S. at 690, 109 S.Ct. at 2144. Given this ruling, by definition if a charitable contribution is deductible, *i.e.* without adequate consideration, it cannot be in exchange for "reasonably equivalent value." *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir.1981) (fair consideration for bankruptcy purposes is more than consideration needed to support a simple contract).

2. *If Debtors Received "Reasonably Equivalent Value," Was It "In Exchange For" Contributions?*

Even if the debtors received "reasonably equivalent value," the Court finds that the church did not provide that value "in exchange for" the debtors' contributions. The parties stipulated that the church's support and services are available to all, regardless whether contributions are made. This stipulation precludes a finding that the church provided its services "in exchange for" debtors' contributions. The church's argument that debtors received a tax deduction "in exchange for" the

contributions is also unpersuasive. A charitable contribution is deductible only if there is no quid pro quo. *Hernandez,* 490 U.S. at 690, 109 S.Ct. at 2144. The Court declines to hold that although a tax deduction is not a quid pro quo for a donation, a tax deduction is given "in exchange for" a donation. *See Rubin,* 661 F.2d at 991.

3. *Other Case Law*

The Court agrees with the bankruptcy court's conclusion that the other cases addressing this issue have glossed-over the statutory requirements in order to reach the "right" result. In *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am.),* 24 B.R. 973 (Bankr.N.D.Tex.1982), the bankruptcy court concluded that "reasonably equivalent value" did not require that a monetary equivalent be received in exchange. *Id.* at 979. The bankruptcy court held that the "good-will" received in return for the contributions satisfied the "reasonably equivalent value" requirement and the contributions could not be recovered as fraudulent transfers. *Id. Upreach Ministries* is inconsistent with this Court's precedent stating that the benefits received must be "fairly concrete." *First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.),* 110 B.R. 414, 420 (D.Minn.1990). Moreover, the *Upreach Ministries* court did not discuss whether the contributions were given "in exchange for" the good-will it received. For these reasons, the Court declines to follow *Upreach Ministries.*

Turning to *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses),* 59 B.R. 815 (Bankr.N.D.Ga.1986), while

the Court finds that this case's analysis suffers from many of the same flaws of *Upreach Ministries*, it is also distinguishable from the case at bar. In *Ellenberg*, the bankruptcy court premised its holding in part on the fact that the church required the contributions as a condition of one of the debtor's employment as a deacon and thus the contributions could be directly tied to the monetary compensation and benefits he received through his employment by the church. *Id.* In this case, the debtors have stipulated that they were not required to tithe. Accordingly, the Court concludes that debtors did not receive value in exchange for their contributions.

4. *Summary*

The church states that it is offended at the characterization of the transfers as "fraudulent." Unfortunately, that is the label the Bankruptcy Code places on transactions that harm the interests of creditors in general, and fraudulent intent is not required. *Ellenberg*, 59 B.R. at 819. While describing the donations as "avoidable transfers" rather than "fraudulent transfers" may be more appropriate because it lessens the inference of culpability, the purpose of section 548 is where attention should be focused. The avoiding powers of the Bankruptcy Code are designed to maximize the size of the estate in order to maximize the distribution to innocent creditors. *Minnesota Utility*, 110 B.R. at 417. The fact that debtors made gratuitous transfers to their church rather than to, for example, family members or some non-religious charity does not materially alter the analysis. In short, the Court concludes that, as a matter of statutory interpretation, debtors did not receive "reasonably equivalent value"

from the church's services and, even if the church's services constituted "reasonably equivalent value," the services were not provided "in exchange for" the debtors' $13,450 in donations.

IV. *Constitutional Issues*

The church argues that if the Court finds that the debtors' donations were avoidable transfers under section 548, applying section 548 in this case would violate the Free Exercise and Establishment Clauses of the Constitution. Before addressing the merits of those arguments, however, the Court must decide whether the church can raise constitutional issues for the first time on appeal and whether the church has standing to raise constitutional objections on behalf of the debtors.

A. *Issues Raised for the First Time on Appeal*

The church admits that it is seeking to raise constitutional arguments for the first time on appeal. Although the general rule is that an appellate court should not consider arguments not presented to the trial court, a blanket prohibition on new arguments is far too broad. *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir.1991). The appellate court has discretion in light of the facts and circumstances of a particular case to consider an issue for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). The Court should exercise this discretion carefully, however, and should consider whether the proper resolution is beyond any doubt, whether injustice might

otherwise result, or whether the argument involves a purely legal issue on which no additional evidence or argument would affect the outcome of the case. *Id.; Universal Title,* 942 F.2d at 1314-15.

The church argues that because the bankruptcy court noted in its opinion that constitutional questions may exist, the church should be allowed to argue this point on appeal. The trustee objects and asserts that the bankruptcy court's mention of potential constitutional questions was merely dicta and cannot provide the basis for the Court to disregard the general rule that issues cannot be raised for the first time on appeal.

The Court will exercise its discretion to consider the church's constitutional arguments because they involve purely legal issues on which no additional evidence would affect the outcome of the case. *Universal Title,* 942 F.2d at 1314-15. However, although the Court finds that the church is not procedurally barred from raising constitutional issues, the church must also establish that it has standing to raise constitutional issues.

B. ***Standing***

The trustee asserts that the church does not have standing to raise constitutional arguments because those claims must be brought by the debtors. The church relies on principles of third-party standing to overcome this objection.

The Supreme Court has held that standing rules differ depending on whether claims are based on the Free Exercise Clause or the Establishment Clause. Generally,

individuals must allege infringement on their own religious freedoms to bring a Free Exercise Clause claim. *McGowan v. Maryland*, 366 U.S. 420, 429, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961). There is an exception to the general rule which permits a litigant to raise the religious rights of third-parties if the third-parties cannot effectively assert those rights themselves. *Id.* at 430, 81 S.Ct. at 1107; *Corey v. City of Dallas*, 492 F.2d 496, 497 (5th Cir.1974). Standing under the Establishment Clause is broader than under the Free Exercise Clause because the Establishment Clause is designed to protect more than an individual's rights; it also protects society against "political tyranny and subversion of civil authority." *McGowan*, 366 U.S. at 430, 81 S.Ct. at 1107.

The church clearly has standing to challenge the bankruptcy court's order to return the donations as a violation of the separation between church and state. However, a determination whether the church should be allowed to raise objections based on an alleged violation of debtors' free-exercise rights requires an analysis of whether debtors could effectively assert those rights themselves. *McGowan*, 366 U.S. at 430, 81 S.Ct. at 1107. The Court concludes that debtors cannot effectively assert those rights. The debtors' estate and the church are parties in this proceeding; the debtors are not directly involved. Thus, debtors cannot effectively assert their free exercise rights in this case. Moreover, there is no indication that debtors might be able to assert their free exercise rights in some other forum. Accordingly, the Court finds that the church has standing to raise both Establishment Clause and Free Exercise Clause issues.

C. Merits of the Constitutional Arguments

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. Const. Am. I. The church presents several constitutional arguments which overlap in many respects. Generally, however, the church argues that the bankruptcy court's order violates the Free Exercise Clause and the Establishment Clause of the First Amendment.

1. *Free Exercise Clause*

The Free Exercise Clause prohibits governmental regulation of religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). However, "[n]ot all burdens on religion are unconstitutional." *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982). The government may regulate conduct or acts which have only an "incidental effect" on religion. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990). Thus, an individual cannot escape a valid and neutral law of general applicability by merely asserting that the law violates his or her religious beliefs. *Id.* 494 U.S. at 878-80, 110 S.Ct. at 1600-01. A law of general applicability may, however, violate the First Amendment if other constitutional protections, such as freedom of speech, are also at stake. *Id.* 494 U.S. at 880-82, 110 S.Ct. at 1601-02. Absent evidence that a law is designed to regulate religious conduct or beliefs, the law is presumed to be a neutral law of general applicability.

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir.1991).

The Supreme Court's decision in *Smith* "dramatically altered the manner in which we must evaluate free exercise complaints." *American Friends Service Cmte. v. Thornburgh*, 961 F.2d 1405, 1407 (9th Cir.1991). The Third Circuit has described the change in free exercise doctrine as follows:

> Prior to [*Employment Division, Dept. of Human Resources of Oregon v.*] *Smith* [494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)], the case law of the inferior courts construing the free exercise jurisprudence of the Supreme Court consistently concluded that application of any statute to prohibit such a religious practice must be subjected to compelling scrutiny. This understanding was erroneous. . . . Indeed, the Court held that a criminal statute of general applicability not directed at religious practices is simply not subject to free exercise challenge. . . . [T]he rationale of the *Smith* opinion is not logically confined to cases involving criminal statutes.

Salvation Army v. New Jersey Dept. of Community Affairs, 919 F.2d 183, 194-95 (3d Cir.1990).

The church argues that the bankruptcy court's order violates the debtors' free exercise rights in several respects. First, the church asserts that the court's interpretation of the Bankruptcy Code results in discrimination against religion. The Code treats a variety of expenditures and property more favorably than other expenditures and property. For example, section 522 allows a debtor to exempt from property of the estate a residence, a motor vehicle, and a limited amount of

household goods and furnishings, among other things. 11 U.S.C. § 522(d). The church argues that it is unconstitutional to not include religious expenditures in the list of items accorded favorable treatment under the Code. The church emphasizes the strength of the debtors' religious beliefs and argues that the principle of tithing is as much a matter of necessity as expenditures for food or clothing, expenditures that the Bankruptcy Code permits as part of a Chapter 13 plan. In short, the church argues that the "Free Exercise Clause mandates that tithes made to a church out of a sense of religious obligation or requirement be treated in the same manner as the many other items that are treated by the Code as exempt property or permitted personal expenditures." Appellant's Mem. at 13. In support of this argument, the church cites several cases which have held that confirmation of a Chapter 13 plan which provides for regular religious donations does not violate the Constitution. *In re McDaniel,* 126 B.R. 782, 784-85 (Bankr.D.Minn.1991) (per se prohibition on religious contributions as reasonably necessary expense would violate free exercise rights, but prohibition on excessive donations does not); *In re Bien,* 95 B.R. 281, 283 (Bankr.D.Conn.1989) (non-discretionary tithing constituted reasonably necessary expenditure and included in plan); *In re Navarro,* 83 B.R. 348 (Bankr.E.D.Pa.1988) (confirmation of plan which included tithing would not force creditor to support religious views in violation of the Establishment Clause); *In re Green,* 73 B.R. 893 (Bankr.W.D.Mich.1987), *aff'd,* 103 B.R. 852 (W.D.Mich.1988) (plan which provides for tithing does not violate the Establishment Clause; in fact, denial of

confirmation solely because it included tithing would violate Free Exercise Clause).

Second, the church argues that the bankruptcy court's order violates debtors' rights to freely exercise their religion. The church asserts that the Supreme Court's decision in *Smith* does not apply to the case at bar. The church argues that the Bankruptcy Code is not a neutral law of general applicability because it contains many provisions which call for courts to make decisions based on the particular facts and circumstances of a case. Thus, the church asserts, the trustee must establish that the return of the contributions will serve a compelling state interest that cannot be achieved through less restrictive means. *See Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The church argues that enlarging the pool of funds from which creditors may make claims cannot be deemed a compelling governmental interest. The church asserts that the fact that the Bankruptcy Code exempts certain property from the estate and allows certain necessary expenditures establishes that maximizing the funds available to creditors is not a compelling governmental interest.

Third, the church argues that the bankruptcy court's order violates debtors' "hybrid" free exercise/free speech rights to support their religion. In *Smith*, the Supreme Court left the door open for challenges to neutral laws of general applicability when the laws impact not only the free exercise of religion, but some other constitutional protection as well. The church argues that through their contributions the debtors were supporting the dissemination of a particular message protected by the Free Speech Clause. The church asserts that this "hybrid" free speech/

freedom of religion argument must be analyzed under the compelling interest and less restrictive means test. The church contends that the trustee cannot satisfy this test.

The trustee directly responds to each of the church's arguments. First, the trustee argues that section 548 is a neutral statute of general applicability. The trustee points out that section 548 applies to "any transfer." The trustee also argues that it is inappropriate to compare section 522, which exempts certain property from the estate, and section 1325, which provides for certain expenditures that are reasonably necessary for maintenance and support, with section 548, which governs fraudulent transfers. The trustee argues that these statutory provisions serve distinct purposes and that these distinct purposes explain why different results may occur under each provision. Moreover, the trustee argues, different results under different Code provisions is not equivalent to disparate treatment on the basis of religion. Second, the trustee argues that because this dispute involves a neutral statute of general applicability, the Supreme Court's holding in *Smith* requires a finding that the Free Exercise Clause has not been violated. The trustee asserts that the infringement on religious freedom in this case is merely an "incidental effect" of this neutral statute. Finally, the trustee asks the Court to reject the church's "hybrid" free speech/free exercise claim. The trustee argues that the cases cited by the Supreme Court in describing such a claim were all decided on the basis of free speech principles. The trustee asserts that this case does not involve substantial free speech elements and the *Smith* analysis controls.

The Court concludes that section 548 is a neutral statute of general applicability. There is no evidence in the statutory text or otherwise that section 548 was designed to regulate religious beliefs or conduct. Thus, section 548 is presumed to be a neutral law of general applicability. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir.1991). The issue is whether section 548 has more than an "incidental effect" on religion. *Smith*, 494 U.S. at 878, 110 S.Ct. at 1600. The Court finds that it does not. The purpose of the statute is to enlarge the pool of funds for creditors by recovering gratuitous transfers made on the eve of bankruptcy by insolvent debtors. *First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.)*, 110 B.R. 414, 417 (D.Minn.1990). There is no evidence that in achieving this purpose section 548 has had any more than an "incidental effect" on religion. A variety of other laws, federal and state, clearly apply to religious organizations and its members, *see, e.g., Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) (suit brought to enforce Internal Revenue Code); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security); *South Ridge Baptist Church v. Industrial Comm. of Ohio*, 911 F.2d 1203 (6th Cir.1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 754, 112 L.Ed.2d 774 (1991) (workers' compensation); *E.E.O.C. v. Tree of Life Christian Schools*, 751 F.Supp. 700 (S.D.Ohio 1990) (Equal Pay Act); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *cert. denied*, 498 U.S. 846, 111 S.Ct. 131, 112 L.Ed.2d 99 (1991) (minimum wage laws), and the Court finds that the Bankruptcy Code is no different. In short, because section 548 is a neutral law of general

applicability, and because the statute has only an "incidental effect" on religion, the church's free exercise challenge fails. *Salvation Army v. New Jersey Dept. of Community Affairs*, 919 F.2d 183, 194-95 (3d Cir.1990).

Even if *Smith* did not apply in this case, the Court is satisfied that the Bankruptcy Code is designed to advance a compelling government interest. *See, e.g., Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) (Internal Revenue Code serves compelling governmental interest); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security). The government's policy of allowing debtors to get a fresh start while at the same time treating creditors as fairly as possible qualifies as a compelling interest. Again, however, this is of limited relevance because Smith does not require the finding of a compelling interest.

The Court also finds unpersuasive the church's argument that section 548 unfairly discriminates against religious contributions. The church asks the Court to find unfair discrimination based on the fact that section 522 exempts a variety of property, but not religious donations, from the property of the estate and the fact that several courts have allowed religious donations to be made under the terms of a Chapter 13 plan. The Court cannot accept this argument because the requirements and purposes of these provisions are different. Section 522 allows a debtor to exempt some property from the estate in order to allow the debtor to get a fresh start. *Johnson v. Ford Motor Credit Co. (In re Johnson)*, 57 B.R. 635, 639 (Bankr.N.D.Ill.1986). Courts allowing tithing under the terms of a Chapter 13 plan have found it to be "reasonably necessary . . . for the maintenance or support

of the debtor." 11 U.S.C. § 1325(b)(2). By contrast, section 548 calls for a determination whether "reasonably equivalent value" was received "in exchange for" the contributions. The different purposes of these statutory provisions make clear that the Bankruptcy Code tries to treat both debtors and creditors fairly. It does not establish that section 548 unfairly discriminates against religion.

Finally, the Court is unpersuaded by the church's argument that their contributions were for the support of the dissemination of a particular message and thus their free speech rights have been violated. A limitation on the amount that a person may contribute to a cause "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley v. Vako*, 424 U.S. 1, 20-21, 96 S.Ct. 612, 635, 46 L.Ed.2d 659 (1976) (per curiam). Contributions are symbolic acts of support, rather than expository acts of advocacy. *Id.* at 21, 96 S.Ct. at 635. Moreover, even if section 548 has the effect of regulating speech, a content-neutral law is constitutional if it is narrowly tailored to serve a significant governmental interest and leaves open alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 796-97, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989). As the Court stated earlier, section 548 is designed to serve a significant governmental interest – maximizing the amount creditors are able to recover. Alternative channels of communication are also available. Debtors remain able to support the message of the church in a variety of ways. A limitation on the amount a person may contribute to an organization does not infringe on the contributor's freedom to discuss the particular message of that organization. *Buckley*, 424 U.S. at 21, 96 S.Ct. at 635.

In short, the Court holds that an order for the church to turn over debtors' contributions, which were made while the debtors were insolvent, does not violate debtors' free exercise or free speech rights.

2. *The Establishment Clause*

A statute or governmental action will not violate the Establishment Clause if it can pass a three-pronged test: (1) it must have a secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

The church argues that, in addition to burdening debtors' free exercise rights, the bankruptcy court's order violates the church's rights by interfering in the autonomy of the church and entangling government in the operations and activities of the church. The church argues that if the bankruptcy court's order is affirmed, the church will constantly be concerned that courts will seize contributions made by members and thus the church will constantly be concerned about its financial stability. The trustee responds by arguing that Establishment Clause concerns are wholly lacking in this case. The trustee asserts that an Establishment Clause claim would arise only if the Court accepted the church's arguments and granted special treatment under section 548.

The Court concludes that the bankruptcy court's interpretation of section 548 does not violate the Establishment Clause. First, section 548 has a secular purpose –

to maximize the size of the estate. The provision is neutral in both design and purpose. *See Hernandez v. C.I.R.*, 490 U.S. 680, 695, 109 S.Ct. 2136, 2147, 104 L.Ed.2d 766 (1989). Second, the primary effect of section 548 is neither to advance nor inhibit religion. The mere fact that the government brings suit to enforce a religious entity's compliance with a statute does not elevate the primary effect of the statute to one that inhibits religion. *See, e.g., Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) (suit brought to enforce Internal Revenue Code); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security). Third, section 548 does not threaten excessive entanglement between church and state. The routine enforcement of statutes which involves no inquiries into religious doctrine does not violate the nonentanglement command. *Hernandez*, 490 U.S. at 695, 109 S.Ct. at 2147. Moreover, the fact that the government is forcing the church to disburse funds does not result in excessive entanglement. *Jimmy Swaggert Ministries v. Bd. of Equalization*, 493 U.S. 378, 393, 110 S.Ct. 688, 698, 107 L.Ed.2d 796 (1990); *South Ridge Baptist Church v. Industrial Comm. of Ohio*, 911 F.2d 1203, 1210-11 (6th Cir.1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 754, 112 L.Ed.2d 774 (1991). Finally, the Court agrees with the bankruptcy court's opinion that a ruling in favor of the church could lead to Establishment Clause problems. If the Court held that the debtors received "value" "in exchange for" their contributions, the next issue would be to quantify that "value" to determine if it was "reasonably equivalent" to the amount of the contributions. Such a subjective inquiry could be "fraught with the sort of entanglement that the Constitution forbids."

Lemon v. Kurtzman, 403 U.S. 602, 620, 91 S.Ct. 2105, 2115, 29 L.Ed.2d 745 (1971).

In short, the Court holds that an order for the church to turn over debtors' contributions does not violate the Establishment Clause.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that the order of the bankruptcy court is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

In re Bruce YOUNG and Nancy Young, Debtors.

Julia A. CHRISTIANS, Trustee, Plaintiff

v.

CRYSTAL EVANGELICAL FREE CHURCH, Defendant.

Bankruptcy No. 4-92-0871.
Adv. No. 4-92-157.

United States Bankruptcy Court,
D. Minnesota.

Dec. 17, 1992.

Julia A. Christians, Lapp, Laurie, Libra, Abramson & Thomson, Chartered, Minneapolis, Minn., for plaintiff.

Tony Mannella, Babcock, Locher, Neilson & Mannella, Anoka, Minn., for defendant.

ROBERT J. KRESSEL, Chief Judge.

This adversary proceeding came on for hearing on October 7, 1992, on the parties' cross-motions for summary judgment. Julia A. Christians, the plaintiff, appeared *in propria persona* and F. Anthony Mannella appeared on behalf of the defendant. This court has jurisdiction pursuant to 28 U.S.C. §§ 1134 and 157(a) and Local Rule 201. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(H).

UNDISPUTED FACTS

The parties have stipulated to certain facts for purposes of this motion. On February 3, 1992, Bruce Young and Nancy Young filed a joint chapter 7 petition. The

plaintiff is the trustee in their case. In the year immediately preceding the debtors' filing, the debtors made contributions to Crystal Evangelical Free Church. These contributions totaled $13,450 and were made while the debtors were insolvent.[1]

The debtors were active church members. As a supplement to their tithing, the debtors held numerous positions in the church and had served as officers of the day. The debtors regularly attended church services, actively participated in the church's programs and were welcomed on the premises at any time. These accommodations where [sic] available to the debtors whether they financially supported the church or not. At no time did the church require the debtors to pay any membership or attendance fee. However, the church does teach that people should offer regular contributions to the church. The debtors respected those teachings and made several purely voluntary contributions. However, the debtors did not receive money or tangible property in exchange for their contributions.

The plaintiff brought this adversary proceeding seeking to avoid the contributions pursuant to 11 U.S.C. § 548(a)(2) and recover them pursuant to 11 U.S.C. § 550(a). The plaintiff and the defendant both moved for summary judgment.

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[1] The defendant stipulated to the debtors' insolvency for purposes of this motion only.

ISSUE

The issue is whether contributions, made by a [sic] insolvent debtor to their church during the year preceding the filing of a chapter 7 petition, are avoidable under § 548(a)(2)[2]? I conclude that they are.

DISCUSSION

I.

The Standard For Summary Judgment[3]

Summary judgment plays a very important role allowing the judge to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes to Rule 56. The importance of summary judgment cannot be overemphasized. Indeed, "[s]ummary judgment . . . is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d

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[2] § 548 is entitled "Fraudulent Transfers and Obligations." The implication is unfortunate. While § 548(a)(1) specifically deals with transfers that are fraudulent, fraud is not a requirement for avoidability under § 548(a)(2).

[3] *See generally*, William W. Schwarzer, Allan Hirsch, David J. Barrans, *The Analysis and Decision of Summary Judgment Motions; A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441 (1992); George Loewenstien, *Second Thoughts about Summary Judgment*, 100 Yale L.J. 73 (1990); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745 (1974); Currie, *Thoughts on Directed Verdicts and Summary Judgment*, 45 U.Chi.L.Rev. 72 (1977).

265 (1986) (quoting Rule 1 of the Federal Rules of Civil Procedure). "The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op., Inc.*, 838 F.2d 268, 273 (8th Cir.1988); *see Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 189-90 (D.C.Cir.1985) (Bork, J., dissenting).[4]

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).[5]"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552.

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[4] Judge Bork's comments were later adopted by the United States Supreme Court. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[5] Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, "Rule 56 Fed.R.Civ.P. applies in adversary proceeding[s]." *See* Fed.R.Bankr.P. 7056.

A. *The Burdens*

1. *The Moving Party*

Initially, the burden is on the party seeking summary judgment. It is the moving party's job to inform the court of the basis for the motion, and identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. Simply stated, the moving party must show the court that there is an absence of evidence to substantiate the non-moving party's case. *Id.* at 325, 106 S.Ct. at 2554. To that end, the movant discharges its burden by asserting that the record does not contain a triable issue and identifying that part of the record which supports the moving party's assertion. *See Id.* at 323, 106 S.Ct. at 2552; *City of Mt. Pleasant*, 838 F.2d at 273.

2. *The Non-moving Party*

Once the movant has made its showing, the burden of production shifts to the non-moving party. The non-moving party must "go beyond the pleadings and by [its] . . . own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' " establish that there is specific and genuine issues of material fact warranting a trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(c)). The non-moving party cannot cast some metaphysical doubt on the moving party's assertion. *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d

538 (1986). The non-moving party must present specific significant probative evidence supporting its case, *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir.1990) sufficient enough "to require a . . . judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). Any affidavits must "be made on *personal* knowledge, must set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e) (emphasis added). If, however, the evidence tendered is "merely colorable," or is "not significantly probative," the non-moving party has not carried its burden and the court must grant summary judgment to the moving party. *Id.* 477 U.S. at 249-50, 106 S.Ct. at 2511.

Here, however, the parties have stipulated to all the genuine issues of material fact and have not proffered any additional evidence. Accordingly, judgment may be entered as a matter of law.

II.

Church Contributions as Avoidable Transfers

The trustee asserts that the contributions to the church were avoidable transfers within 11 U.S.C. § 548(a)(2). Section 548, in relevant part, provides:

> Fraudulent transfers and obligations.
>
> (a) The trustee may avoid any transfer of an interest of the debtor in property . . . that was

> made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> . . . . .
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer
>
> . . . . .

11 U.S.C. § 548. Thus, to avoid the transfer, the trustee must prove that:

(1) there was a transfer of the debtors' interest in property;

(2) made on or within a year preceding the filing of the petition;

(3) while the debtors were insolvent; and

(4) the debtors received less than reasonably equivalent value in exchange for the transfer.

First Nat'l Bank in Anoka v. Minnesota Utility Contracting, Inc. (In re Minnesota Utility Contracting, Inc.), 110 B.R. 414, 417 (D.Minn.1990) *aff'g* 101 B.R. 72 (Bankr.D.Minn.1989). The parties have stipulated to the first three elements. Thus these motions boil down to one question: Did the debtors receive reasonably equivalent value in exchange for their contributions? The question really has two

parts.[6] First, did the debtors receive value from the church? Second, if the debtors did receive value was it in exchange for their contributions?

A. *Did the Debtors Receive Value?*

The task of resolving the dispute over the meaning of "value" begins with the language of the statute itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588 (1990) ("the fundamental canon [of] statutory interpretation begins with the language of the statute itself."); *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). "[My] sole function . . . is to enforce [the statute] according to its terms." *Id.*, 489 U.S. at 241, 109 S.Ct. at 1030 (citing *Caminetti v. U.S.*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)). Defining the terms of the statute, I must "presume that a legislature says in a statute what it means and means in a statute what it says . . . " *Connecticut Nat'l Bank v. Germain*, ___ U.S. ___, ___, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) giving effect to the Code's plain meaning. *See, e.g., Patterson v. Shumate*, ___ U.S. ___, ___-___, 112 S.Ct. 2242, 2248-51, 119 L.Ed.2d 519 (1992); Germain, ___ U.S. at ___- ___, 112 S.Ct. at 1149-50; *U.S. v. Nordic Village, Inc.*, ___ U.S. ___, ___, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992); *Union Bank v. Wolas*, ___ U.S. ___, ___, 112 S.Ct. 527, 530, 116 L.Ed.2d 514 (1991); *Board of Governors v.*

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[6] While there is obvious overlap, the two parts require independent analysis. This, unfortunately is consistently ignored by virtually all the reported case law discussing section 548.

MCorp Financial, Inc., ___ U.S. ___, ___-___, 112 S.Ct. 459, 465-66, 116 L.Ed.2d 358 (1991).

> Turning to section 548, "value" is
>
> property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.

11 U.S.C. § 548(d)(2)(A). The church did not satisfy or secure a present or antecedent debt of the debtors. Thus, the inquiry becomes: Did the debtors receive "property"?

1. *What is "Property?"*

While the Bankruptcy Code does not specifically define "property", various dictionaries do. For instance *Blacks Law Dictionary* defines property as

> that which belongs exclusively to one . . . every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. . . .
>
> The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.

Black's Law Dictionary, 1095 (5th ed. 1979). Parsing through the definition, one realizes that rights and things subject to

ownership are property. Things are "whatever may be possessed or owned or be the object of a right. . . . " *Webster's Third New International Dictionary*, 2376 (1981). Ownership is

> . . . [t]he right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to some one in particular, to the exclusion of all other persons. The exclusive right of possession, enjoyment, and disposal. . . .

Black's Law Dictionary, 997 (5th ed. 1979). Rights are established by the

> power or privilege vested in a person by the law to demand action or forbearance at the hands of another: a legally enforceable claim against another that the other will do or will not do a given act . . . the capacity to assert a legally recognized claim. . . .

Webster's Third New International Dictionary, 1955 (1981).

The church asserts that the debtors received property in the form of religious services, theological programs and access to the premises. However, I find this argument unpersuasive. The debtors did not receive legal or equitable rights nor did they obtain any ownership interest from their contributions.

The debtors did not receive an ownership interest in the church or anything else by making their contributions. It is hard to imagine, at least in a mortal sense, that religious services and the like, can be possessed, owned or enjoyed to the exclusion of others. Indeed, the church traditionally is a place shared by all and where all are welcome. In fact, at one time the church was the center of the community tantamount to a town hall. That being the

case, the debtors could not have received an ownership interest in anything from their contributions.

2. *Can Executory Promises Be "Property?"*

Nor did the debtors receive any legal or equitable right to the services[7] the church provided. Since the middle of sixteenth century, executory promises have given rise to legal and or equitable rights. *See* Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum.L.Rev. 35, 102 (1983) (citing *Rogers v. Snow, Danlison*, 123 Eng.Rep. 301 (C.P.1572)). Executory promises are bargained for exchanges in which one party owes, in a contractual sense, performance to another in the future. If either party fails to perform, a breach may be declared and the innocent party may assert legal or equitable rights. These rights arising under executory

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[7] While not receiving property, the debtors, before and after making their contributions, did receive services. Services are "act[s] done for the benefit . . . of another." *Webster's Third New International Dictionary*, 2075 (1981). The debtors plainly benefited from acts performed by the church. The debtors enjoyed their association with the Church and regularly attended church services and functions. Attending these services and functions, the debtors were comforted by the theologians unreserved advice, teachings, warmth and gospel. This spiritual comfort, I suspect, is what the debtors sought and what the church offered through its actions. Simply, the church acted, whether directly or indirectly, for the benefit of the debtors who received services. This, however, does not answer the question of whether the debtors had a *right* to such services.

promises yield "value."[8] *Schlecht v. Schlecht*, 168 Minn. 168, 209 N.W. 883, 886 (1926) (assignment of interest in a contract in exchange for labor and materials to be furnished in the future was for value); *Freitag v. The Strand of Atlantic City*, 205 F.2d 778, 784 (3rd Cir.1953) (executory promises may be very valuable); *Hummel v. Cernocky*, 161 F.2d 685, 686 (7th Cir.1947) (transfer of property to son who took over the mortgage was for value); *Chagnon Lumber Co. v. DeMulder*, 121 N.H. 173, 427 A.2d 48, 50 (1981) (citing *Osgood v. Insurance Co.*, 93 N.H. 160, 37 A.2d 12, 13 (1944)) (conveyance by husband of his interest in house in exchange for wife's promise to obtain second mortgage loan and use money to satisfy husband's debts

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[8] While there are numerous cases opining that the Code's definition of value leaves "no room for a mere executory promise from the transferee as constituting that value", those cases are, in my opinion, incorrectly decided. Indeed, many of the cases rest on the Uniform Fraudulent Conveyance Act which has been subsequently modified. Those modifications are found in the Uniform Fraudulent Transfers Act which specifically provides that executory promises are "value." *See* Uniform Fraudulent Transfers Act § 3, 7A U.L.A. 651-52 (1992) comment 4. Moreover, some courts are plainly confused. A good example of this confusion is *Gray v. Snyder (In re Gray)*, 704 F.2d 709 (4th Cir.1983). The *Gray* court cites *Collier on Bankruptcy* for the proposition that reasonably equivalent value under § 548 excludes future consideration, at least to the extent not actually performed. *Id.* at 711. Then, one paragraph later the *Gray* court essentially finds that a transfer of debtor's interest in home in exchange for future alimony is value. *Id.* at 712. The court, however, mischaracterizes the alimony as a "present or antecedent debt." *Id.* Plainly, the obligation to pay alimony is an executory promise. This mischaracterization, as well as the court's determination, are just a sample of the confusion among courts over the issue of executory promises.

was for value); *In re Fair*, 142 B.R. 628, 631 (Bankr.E.D.N.Y.1992) (transfer benefitting daughter and wife as part of a bargained for separation agreement and divorce whereby ex-wife agreed to forego any claim for maintenance in return for the conveyance, is a transfer for fair consideration); *In re Cottrill*, 118 B.R. 535, 537 (Bankr.S.D.Ohio 1990) (transfer by debtor to increase retirement payments is a transfer for value); *see also Quinn v. Union Nat'l Bank*, 32 F.2d 762, 771 (8th Cir.1929) (executory promises are value if unconditionally performed in the future). *Cf. In re Tveten*, 402 N.W.2d 551, 556 (Minn.1987) (character of the property received is not considered when determining "value.").

In addition to the case law, the Code itself recognizes some executory promises as value. While not directly applicable, section 541 is telling of what Congress meant when it said "property." Foremost, Congress intended that property be defined broadly. H.R.Rep. No. 595, 95th Cong. 1st Sess. 367-368 (1977); S.Rep. 989, 95th Cong., 2d Sess. 82-83 (1978) U.S.Code Cong. & Admin.News p. 5787. "Property" is all encompassing. *Id.* This broad and all encompassing definition clearly includes executory promises. The plain language of section 548 supports my point. As previously stated, executory promises give rise to rights which are themselves considered a "legal or equitable interest of the debtor in property." 11 U.S.C. § 541(a)(1). For example: If prior to bankruptcy, a debtor had paid in advance to have his lawn mowed, no one would doubt that the debtor had the "right" to have his lawn mowed and that right was property of the estate under § 541(a)(1).

This broad, all encompassing definition of property is reflected and carried over into section 548. That becomes apparent focusing on the operative language of the statute. The plain language of section 548(d)(2)(A) tells me that the whole world of property is value less one specific exception, the "unperformed promise to furnish support to the debtor or a relative of the debtor." 11 U.S.C. § 548(d)(2)(A). The negative implication of this specific exclusion is that "property" includes any other kind of enforceable executory promise. *See* 2 David E. Epstein, Steve H. Nickles, James J. White, Bankruptcy, § 6-49, p. 21 (1992). Any other reading of section 548(d)(2)(A) does not give credence to the Code's plain meaning.

Further support is found in the comments to section 3 of the Uniformed Fraudulent Transfer Act (UFTA).[9] Indeed, the drafters of the UFTA made it clear that value includes executory promises:

> [T]he Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. Courts construing . . . prior law nevertheless have *held unperformed promises to constitute value in a variety of circumstances.* . . .

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[9] The Uniform Fraudulent Transfers Act is the successor to the Uniform Fraudulent Conveyance Act. One of the key changes in the UFTA was the discarding of the concept of "fair consideration" in favor of the Bankruptcy Codes "reasonably equivalent value" defining "value" as the Code does. *See* Uniform Fraudulent Transfers Act, 7A U.L.A. 651 comment 3; Minn.Stat. § 513.43 (1992) (adopting and codifying as state law the Uniform Fraudulent Transfers Act); *see generally*, Peter A. Alces & Luther M. Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U.Ill.L.Rev. 527, 539-543 (1985).

> On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. *This Act [defining "value"] adopts the view that [executory promises are value].*

Uniform Fraudulent Transfers Act § 3, 7A U.L.A. 651-52 (1992) comment 4 (emphasis added). Plainly, the drafters intended to include most executory promises within the definition of value. Thus, precedent, the Code and the UFTA leave but one conclusion; executory promises constitute value.

3. *Did the Church Make Any Executory Promises?*

In addition to yielding value, executory promises also share another common characteristic; consideration. E. Allan Farnsworth, *Farnsworth on Contracts* §§ 2.3-2.4 (1990) (citing *Restatement (Second) of Contracts* § 75; Arthur Corbin, *Contracts* § 143 (1963)); *see generally,* Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England,* 83 Colum.L.Rev. 35, 102 (1983) (historical foundations of executory promises). Thus, in order for an executory promise to give rise to legal and equitable rights, it must be supported by consideration. Here, however, the church's performance of worship and other services was not supported by consideration. Foremost, the church's performance of worship was not implicitly or explicitly "promised" to the debtors. In fact, the debtors' contributions did not induce the church to perform in any way. There was no link between what the debtor gave or promised to give and the church's behavior. The church

performed unsolicited and independent of the debtors' contributions and in no way did the church change it's position in reliance on the debtors continuing to support the church. *See generally,* E. Allan Farnsworth, *Farnsworth on Contracts* §§ 2.6, 2.9 & 2.10 (1990) (discussing the bargain theory of consideration).

Moreover, the debtors made their contributions receiving unbargained for benefits; the privilege to participate in religious worship. While this worship may have yielded the feelings of association, comfort, affection, companionship and love, these subjectively emotional benefits cannot be bargained for. *See Walker v. Treadwell (In re Treadwell),* 699 F.2d 1050, 1051 (11th Cir.1983) (citation omitted); *In re Porter,* 37 B.R. 56, 60-61 (Bankr.E.D.Va.1984). Thus, any benefits received by the debtors were mere gratuities lacking consideration and deemed valueless. *Id.; see also In re Royal Coach Country, Inc.,* 125 B.R. 668, 673 (Bankr.M.D.Fla.1991); *In re Uhlmeyer,* 67 B.R. 977, 980 (Bankr.D.Ariz.1986); *In re Factory Tire Distribs., Inc.,* 64 B.R. 335, 339 (Bankr.W.D.Pa.1986).

Beyond there being no consideration for the exchange, the charitable contributions were not economically beneficial to the debtor. It is fundamental that the transfer be economically beneficial to the debtor's estate for it to yield "value." *Rubin v. Mfrs. Hanover Trust Co.,* 661 F.2d 979, 993 (2d Cir.1981); *Ransier v. Public Employees Retirement System (In re Cottrill),* 118 B.R. 535, 537 (Bankr.S.D.Ohio 1990) (under § 548(a)(2), it is necessary to show lack of an economic benefit); *Ohio Corrugating Company v. DPAC, Inc. (In re Ohio Corrugating Co.),* 91 B.R.

430, 436 (Bankr.N.D.Ohio 1988) (debtor must receive economic value); *Vadnais Lumber Supply, Inc. v. Byrne (In re Vadnais Lumber Supply, Inc.)*, 100 B.R. 127, 136 (Bankr.D.Mass.1989) (unlike consideration, there must be some measurable economic benefit). The debtors' estate did not obtain any economic value from the church. First, it was the debtors individually and not their pre-petition financial estate or their post-petition bankruptcy estate that received any benefit.[10] Indeed, both estates could not and did not participate in the religious worship. Second, any benefit received by anyone lacked tangible or recognizable economic benefit.[11] Instead, the debtors had the opportunity to participate in religious worship; an item without a marketable financial value or economic utility from a creditor's view. Strictly religious benefits are not

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[10] Any benefit that the debtors may have received, however, was merely incidental. Rev.Rul. 71-580, 1971-2 C.B. 235, 236 ("Religious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to the members of the faith, with the private benefit to individual participants being merely incidental to the broader good that is served."). "The public benefit from religion remains and predominates regardless of whether church doctrines provide for traditional congregational worship or individual worship . . . or whether donations are voluntary or fixed." *Staples v. C.I.R.*, 821 F.2d 1324, 1326 (8th Cir.1987) *vacated*, 490 U.S. 1103, 109 S.Ct. 3271, 104 L.Ed.2d 1014 (1989) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943).

[11] At best, the debtor received "psychic income." Psychic income recognizes that in some sense, no one acts unless action is preferable to inaction and takes into consideration the emotional benefits such as public acclaim, reputation for righteousness or internal pleasure derived from economically unwise decisions.

economically valuable. *See Hernandez v. C.I.R.*, 490 U.S. 680, 690-95, 109 S.Ct. 2136, 2144-46, 104 L.Ed.2d 766, *reh'g denied*, 492 U.S. 933, 110 S.Ct. 16, 106 L.Ed.2d 630 (1989) (distinguishing contributions to Church of Scientology from other contributions to religious organizations for purpose of Tax Code § 170 deductibility); *Staples v. C.I.R.*, 821 F.2d 1324, 1326-27 (8th Cir.1987) *vacated*, 490 U.S. 1103, 109 S.Ct. 3271, 104 L.Ed.2d 1014 (1989) (Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm.); *Neher v. C.I.R.*, 852 F.2d 848, 851-57 (1988) *vacated* 882 F.2d 217 (6th Cir.1989); *Christiansen v. C.I.R.*, 843 F.2d 418, 420-21 (10th Cir.1988) *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1035 (1989).

4. *Can a Value Be Put on Church Services?*

There are other problems with treating church services as property. As previously discussed, executory promises give rise to rights which are enforceable in law and equity. Assuming the debtors' contributions gave rise to valuable enforceable executory promises, how am I or any other judge to enforce them. First, it is nearly impossible to assess damages compensating the debtors for their lost bargain; there is no quantifiable certainty to the calculation. Contributions are not mandatory and amounts are not prescribed; every member contributes a different amount. It is also highly probable that each of the members values their spiritual experience differently if the experience can be valued at all. *See Staples*, 821 F.2d at 1327 ("Spiritual gain to an individual church member cannot be valued by any measure known in the secular

realm.") Simply, there is no objectively or subjectively reasonable way to put the plaintiff in as good a position as if the promise had been honored.[12]

In addition, enforcement of executory promises between the church and its members either by an award of damages or its alternative of specific performance, might raise First Amendment problems. Enforcement puts the court in the delicate position of not only differentiating between "religious" benefits and "secular" ones but also putting a value on those benefits. While I only raise this as a fear, this is the sort of inquiry which I believe is "fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. 602, 620, 91 S.Ct. 2105, 2115, 29 L.Ed.2d 745 (1971); *see id.* at 621-22, 91 S.Ct. at 2115-16; *see generally Hernandez*, 490 U.S. at 693-99, 109 S.Ct. at 2146-48.[13] Thus, there being no way to enforce or compensate the debtors for their contributions, I am left with one conclusion; charitable contributions cannot give rise to an enforceable executory promise.

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[12] It is fundamental that one of the main objectives contract remedies is to put the injured party in as good a position as that party would have been had the contract been performed. *See* E. Allan Farnsworth, *Farnsworth on Contracts*, § 12.1 at 147-48 (1990).

[13] See footnote 17 *infra* and text; *see generally* Note, *Section 170, Tax Expenditures and the First Amendment: The Failure of Charitable Religious Contribution for the Return of a Religious Benefit*, 61 Temp.L.Q. 443 (1988) (discussing general constitutional problems associated with section 170 deduction for contributions to religious organizations).

B. *Was Value Received In Exchange For Charitable Contributions?*

Even if the debtors received value, the question is whether that value was received "in exchange for" the contributions. *See* 11 U.S.C. § 548(a)(2). Here, however, no exchange took place. It is the church's policy to welcome all members to worship regardless of the size of any contribution if one is made at all. The church's offerings were in no way linked to the debtors' contributions. In no way was the worship bargained for as the contributions were purely voluntary driven only by the debtors' feelings of association and goodwill. The debtors' did not and would not have received anything more or less if they would have donated more or donated nothing. The same amount of heat, air conditioning, education and worship was available regardless of the debtors' contribution. The church neither explicitly nor implicitly bound itself to perform exclusively for the debtors or condition its performance on the debtors' contributions. The sermon is for the spiritual gratification of all in attendance, not just those who contribute money. The debtors participated as every other member and received what every other member received; everyone received nothing "in exchange for" their donations.[14]

The Internal Revenue Code further supports the conclusion that the debtors could not have received property in exchange for their contributions. Section 170 of the

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[14] The discussion regarding consideration *supra* at 893 also applies here. Just as the church services were not property because they were not supported by consideration, the debtors' contributions also lack consideration.

Internal Revenue Code permits taxpayers to deduct "charitable contributions." Specifically, a taxpayer may deduct a "contribution or gift to . . . [a religious organization] used exclusively for religious . . . purposes." 26 U.S.C. § 170(c)(4). Recently, the Supreme Court thoroughly analyzed section 170 holding that payments made to a religious organization *in exchange* for quid pro quo do not qualify as charitable contributions.[15] *Hernandez*, 490 U.S. at 691, 109 S.Ct. at 2145. The Court further explained that any benefit to the taxpayer, even those claimed as "purely religious in nature" could give rise to disallowance of a claimed charitable contribution. *Id.* at 691-95, 109 S.Ct. at 2145-46. Simply, the debtor cannot receive both a § 170 tax deduction and § 548 property at the same time. Unwittingly, the church's argument calls into question the right of its members to deduct contributions made to the church.

C. *The Cases.*

The church, going beyond the express language of the statute, cites *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr.N.D.Ga.1986). Moses stands for the proposition that church services constitute property within the meaning of section 548. *Id.* at 818. It is as if *Moses* had descended from Mount Sinai (or would it be Peachtree Street?) with another commandment: "THOU SHALT NOT AVOID RELIGIOUS CONTRIBUTIONS." However, in this instance Moses is trying to be more policymaker than lawgiver.

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[15] See consideration analysis *supra* at 893.

The *Moses* court held that "[a]lthough nothing was given to the Debtors in exchange for the tithes and offerings, this Court finds that the many services provided to the Debtors by the [church] constitute 'property' pursuant to § 548(d)(2)(A)." *Id.* at 818. This conclusion is puzzling and without textual support. The *Moses* court found that "property" was defined by *Black's Law Dictionary*. The *Moses* court quotes the definition. However, this definition is never used. Indeed, without explanation, analysis or the slightest attention to text, the *Moses* court holds that the tithes are property. *Id.* Adding to the problem, the *Moses* court also neglects to address a critical issue: was there an exchange?[16]

Reading between the lines of reasoning, it becomes apparent that the *Moses* court thought what it was doing was "right." While it is not a pleasant task to require a church to refund contributions, "[my] sole function is to enforce the statute according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241, 109 S.Ct. at 1030. Engaging in this important task, I must "presume that a legislature says in a statute what it means and means in a statute what it says." *Germain*, ___ U.S. at ___, 112 S.Ct. at 1149. After all, Congress is the primary public policymaking institution of our government. Absent Constitutional infirmities, when Congress speaks, its words must prevail. Clearly, the *Moses* court's interpretation is not the way Congress wrote the statue [sic]. When balancing the competing public policies of compensating creditors and leaving religious contributions inviolate, a policy in favor of contribution at the expense of creditors would be a

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[16] *See* footnote 6 *supra* and text.

defensible social decision. However, Congress has not made such a decision and it would be inappropriate for a court to substitute its policy decision for Congress'. Courts have no business bending the statute out of shape because they believe that Congress should or might have written the statute a different way.

The *Moses* court places heavy reliance on *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am.)*, 24 B.R. 973 (Bankr.N.D.Tex.1982). The *Missionary* court held that a corporation received reasonably equivalent value in exchange for charitable contributions to a church. *Id.* at 979. Again, the court glosses over the definition of value and its derivations equating the receipt of the church's "good will" with intangible property. *Id.* Specifically, the *Missionary* court found that

> [t]he morale of the employees and the good will of all of those people with whom [the debtor] dealt was reasonably enhanced by the continuation of the charitable contributions. Whether it is called "good will" or whether some other term is applied . . . reasonably equivalent value was received by the [debtor] in exchange for the challenged transfers.

Id. at 979. Again, while the decision may feel right, there is absolutely no textual support for such a conclusion.[17]

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[17] Beyond a finding of no textual support, I am troubled with the notion that it is the judges responsibility to calculate value of the services provided. Moreover, while the parties themselves have not raised First Amendment concerns, I believe they exist when entertaining the tasks the *Missionary* court would have me undertake. *See Hernandez v. C.I.R.*, 490 U.S. 680, 693-701, 109 S.Ct. 2136, 2146-50, 104 L.Ed.2d 766 (1989) *aff'g*

While I am *not* thrilled about making a church return contributions, especially under a statute titled "fraudulent transfers," I cannot adopt what the church, the *Moses* and *Missionary* courts urge as the voice of Congress is loud; property is value, charitable contributions are not.

III.

Conclusion

When Congress speaks as clearly as it has done here, the plain meaning of the legislation is conclusive, except in those "rare cases" in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. *Ron Pair Enters., Inc.*, 489 U.S. at 242, 109 S.Ct. at 1031 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). However, defining property as to not include the rendering of services does not contravene the

---

Hernandez v. C.I.R., 819 F.2d 1212 (1st Cir.1987). As the First Circuit stated:

> [I]magine, a case in which the government monitored church records in a [sic] an attempt to place a monetary value on the benefit of all church services, group programs, and pastoral counselling generally available to contributing members. Such a case would present not only the problem of determining value but also the problem of excessive entanglement in the affairs [of] a religious institution.

Hernandez, 819 F.2d at 1218, *aff'd Hernandez v. C.I.R.*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *see also* footnote 13 *supra* and text.

intent of the drafters of the Code. Indeed, such an interpretation does not conflict with any other section of the Code, the legislative history of section 548 or, for that matter, with any important state or federal interest. When Congress enacted the Code, it envisioned the expeditious and fair collection, liquidation and distribution of the debtors' *entire* chapter 7 estate. To that end, section 548 empowers the trustee to get back gratuitous transfers that have depleted the resources available to creditors. Here, the trustee has correctly asserted that power. The transfers fit squarely within section 548 and can be avoided. *See* 11 U.S.C. § 548(a).

The church has failed on all grounds to articulate any argument or policy reason why charitable contributions should not be avoided under section 548. The language being clear and in conformity with the intent of Congress, the plain meaning is conclusive.

THEREFORE, IT IS ORDERED:

1. The plaintiff's motion for summary judgment is granted;

2. The defendant's motion for summary judgment is denied;

3. The transfers by the debtors to the defendant between February 3, 1991 and February 3, 1992, totalling $13,450 are void; and

4. The plaintiff shall recover from the defendant the sum of $13,450 together with costs of $120 and interest as provided by law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

CHAPTER 21B – RELIGIOUS FREEDOM RESTORATION

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398

(1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub. L. 103-141, § 2, Nov. 16, 1993, 107 Stat. 1488.)

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain

appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub. L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488.)

§ 2000bb-2. Definitions

As used in this chapter –

(1) the term "governemnt" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub. L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or

otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub. L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

TITLE II – BANKRUPTCY

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

* * *

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

* * *

(d)(2) In this section –

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

* * *

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub. L. 97-222, § 5, July 27, 1982, 96 Stat. 236; Pub. L. 98-353, title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub. L. 99-554, title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 101-311, title I, § 104, title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub. L. 103-394, title V, § 501(b)(5), Oct. 22, 1994, 108 Stat. 4142.)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	BKY Case No. 4-92-0871
Bruce and Nancy Young, Debtor(s)	Chapter 7
Julia A. Christians, Trustee, Plaintiff,	ADV No. 4-92-157
vs	**STIPULATION**
Crystal Evangelical Free Church, Defendant(s).	

Plaintiff Julia A. Christians, Trustee and Defendant Crystal Evangelical Free Church, hereby stipulate and agree as follows:

1. Plaintiff is the Trustee of this Chapter 7 bankruptcy case.

2. Bruce and Nancy Young, Debtors, filed a Chapter 7 bankruptcy petition on February 3, 1992.

3. At all times relevant to the claims stated in Plaintiff's Complaint, Debtors were members of Crystal Evangelical Free Church.

4. During the one year period preceding the Debtors' bankruptcy filing, from February 3, 1991 through February 3, 1992, Debtors contributed tithes to Defendant in the amount of $13,450.00.

5. The aforesaid contributions amounting to $13,450.00 are the transfers which Plaintiff's action seeks to recover.

6. Debtors supplemented their tithing with further gifts of their time and talent. Mr. Young has held numerous offices in the Church including elder, and has served as communion usher and offering counter. Mrs. Young was chair of the Church's Womens' Ministry Council, and has served as a volunteer receptionist. Both debtors also have served as officers of the day.

7. Defendant withdraws certain affirmative defenses asserted in its Answer to Plaintiff's Complaint, including the doctrine of laches, statute of limitations, waiver and estoppel.

8. Defendants regularly attended church services, participated in the Church's programs and had access to its facilities, but received no money or tangible property in exchange for their contributions.

9. Crystal Evangelical Church does not charge any membership or attendance fee or refuse support and services to members or attendees on the basis of nonpayment, but does teach that people should offer regular contributions to the Church.

10. Debtors' sworn bankruptcy schedules show total assets of $308,010.00 and total liabilities of $405,097.19.

11. Debtors' sworn bankruptcy Statement of Financial Affairs shows that debtors transferred no assets within the year preceding the bankruptcy filing.

12. Debtors' sworn bankruptcy schedules show that debtors exempted all equity in all assets.

LAPP, LAURIE, LIBRA, ABRAMSON
& THOMSON, CHARTERED

Dated: September 18, 1992

/s/ Julia Christians
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Supreme Court, U.S.
FILED
JUN 24 1998
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No. 97-1744

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

JULIA A. CHRISTIANS, TRUSTEE
Petitioner,
v.
CRYSTAL EVANGELICAL FREE CHURCH
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the judgment below is correct under the Religious Liberty and Charitable Donation Protection Act of 1998.

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STATEMENT OF THE CASE

The Trustee in Bankruptcy sued the Church to recover contributions made in good faith by members who subsequently filed for bankruptcy. The Court of Appeals held that the Trustee's claim was barred by the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994). That opinion is now reported as *In re Young*, 141 F.3d 854 (8th Cir. 1998) (Pet. App. A1).

The Trustee's claim is based on the former 11 U.S.C. §548(a)(2) (1994). The Religious Liberty and Charitable Donation Protection Act of 1998, signed by the President on June 19, 1998, entirely rewrites §548(a)(2). The new §548(a)(2) unambiguously vindicates the judgment below. The Act is printed in full as an Appendix to this Brief. The Act and much of its legislative history are available on Thomas, the website of the Library of Congress.[1]

Prior to enactment of new §548(a)(2), the Church defended against the Trustee's claim on multiple grounds: that the Trustee and the courts below were misinterpreting

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[1] http://thomas.loc.gov. The Public Law number is not yet available; the enacted bill was S.1244. The text of the bill can be retrieved by searching for this bill number; with the text are links to statements in the Congressional Record, and to a Bill Summary and Status File, which shows each step towards enactment. At the Thomas home page, there is a link to committee reports; House Report 105-556 is the report of the House Committee on the Judiciary on the companion bill, H.R. 2604. Also on the Thomas home page is a link to Committee home pages. At the home page of the House Committee on the Judiciary is a link to hearing testimony, then to the Subcommittee on Commercial and Administrative Law, and then to the testimony at a hearing on H.R. 2604 and H.R. 2611 held on February 12, 1998. The Senate Committee did not file a written report, and the testimony at the Senate hearing does not appear to be available on the Internet.

§548(a)(2) as it then stood, that the Trustee's interpretation of former §548(a)(2) violated the Free Exercise Clause, and that the Trustee's claim was barred by RFRA. The Church may defend the judgment below on any of these grounds.[2] But the judgment below is so clearly correct under new §548(a)(2) that none of these issues can be reached.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Is So Clearly Correct Under New Legislation That No Other Question Is Presented.

This case is controlled by the Religious Liberty and Charitable Donation Protection Act of 1998, passed unanimously in both houses of Congress and signed by the President on June 19. This legislation responds to the unprecedented misuse of the Bankruptcy Code by litigation such as the Trustee's unsuccessful claim in this case.

Section 3(a) of the new Act amends 11 U.S.C. §548(a). It renumbers the former paragraph (2) as paragraph (1)(B), and it adds the following as the new §548(a)(2):

> *(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--*
>
> > *(A) the amount of that contribution does not exceed 15 percent of the gross annual*

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[2] Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984); Washington v. Confederated Bands, 439 U.S. 463, 476 n.20 (1979).

income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

Section 5 makes the Act applicable to any case "that is pending or commenced on or after the date of enactment of this Act." Section 2 defines "charitable contribution" to mean a tax deductible contribution, of cash or financial instruments, to a charity described in §§170(c)(1) or 170(c)(2) of the Internal Revenue Code.

This case is still pending, so the Act applies. The contributions at issue were about ten percent of the donors' income, Pet. App. A3, well below the Act's 15% safe harbor.[3] The contributions consisted of cash, transferred by personal check. Affidavit of Bruce Young at 2. There is no dispute that the contributions were tax deductible and that the Church is an entity described in §170(c)(2) of the Internal Revenue Code. *See* Pet. App. A123-24. All the elements of the new Act are satisfied; indeed, the Act was designed precisely to cover this case and cases like it.

If the Court granted certiorari, it would inevitably affirm under new §548(a)(2) without reaching any of the issues set

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[3] Contributions totaled $13,450 in the year before the petition was filed on February 3, 1992. Pet. App. A104-05. The debtors' gross income in 1991 was $140,000. Statement of Financial Affairs at 1-2. The debtors were forced into bankruptcy by the failure of the husband's business. Affidavit of Bruce Young at 2.

out in the petition, and without reaching any of the other grounds on which the Church could defend the judgment below. The Trustee's claim under former §548(a)(2), the Church's defenses under the Religious Freedom Restoration Act and the Free Exercise Clause, the Trustee's constitutional challenge to the Religious Freedom Restoration Act -- none of these questions could be reached. None of these questions will ever again be presented in the same form or on similar facts, and the questions about the interpretation and validity of former §548(a)(2) will never be presented again at all. The questions previously presented under generally worded and perhaps unclear legislation are now definitively resolved by far more specific legislation.

The new Act protects any charity, religious or secular, described in §170(c)(1) or (c)(2) of the Internal Revenue Code. The Trustee's Establishment Clause argument thus collapses. There is not even arguably a preference for religion or a discrimination between religious and secular charities.

There is no doubt of Congress's power to apply new §548(a)(2) to pending cases. This Court has held, recently and unanimously, that legislatures can act retroactively "to correct the unexpected results" of surprising court decisions. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). This is such a case. The right of creditors to recover fraudulent transfers has been part of Anglo-American law for more than four hundred years, and transfers for inadequate consideration have been a badge of fraud since the early days of this law. *See, e.g., BFP v. Resolution Trust Co.*, 511 U.S. 531, 540-41 (1994). Yet this law had never been applied to good faith contributions to churches. When the Trustee first filed her claim in this case, there was no

precedent to support the claim and some precedent against it.[4] The Church has consistently argued that the Trustee's interpretation of former §548(a)(2) was incorrect, unconstitutional, and barred by the Religious Freedom Restoration Act. The Trustee never at any time had a final, unappealed judgment in her favor, and she lost twice in the Court of Appeals prior to the new legislation. Pet. App. A1, A30. But the protracted litigation has been expensive for all sides, and some trustees have won such claims in Bankruptcy Courts and District Courts. *See, e.g., In re Newman*, 203 B.R. 468 (D. Kan. 1996). Congress properly acted to clarify the law and to apply that clarification to pending cases.[5]

The appropriate disposition of this case is to deny certiorari. The case is certainly not moot. The Trustee seeks a money judgment; if she were entitled to such a judgment, it could still be entered and enforced. It would be erroneous to vacate the judgment as moot.

It would also be inappropriate to grant, vacate, and remand for consideration in light of the new Act. The new Act fully vindicates the judgment below; it does not raise the slightest possibility that the judgment below is now in error. A GVR requires "a reasonable probability" that the court below might take a different view of an issue that "may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Here, there is no

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[4] In re Moses, 59 B.R. 815 (Bankr. N.D. Ga. 1986); In re Missionary Baptist Foundation, 24 B.R. 973 (Bankr. N.D. Tex. 1982).

[5] *See also* United States v. Carlton, 512 U.S. 26 (1994) (upholding retroactive tax legislation, despite reliance on unambiguous prior rule, unanimously as to the result); McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 40 n.23 (1990) (noting validity of modestly retroactive legislation).

possibility that the new Act, clearly intended to vindicate the judgment below, would lead the Eighth Circuit to reach a different result or to take a different view of issues it has already twice decided the same way.

The most nearly analogous precedents are those that dismiss writs of certiorari as improvidently granted when a new statute or development "eliminate[s] the issue or make[s] it unlikely that the question will arise again, at least in the same context," or when decision on the issue originally presented becomes unnecessary because "the judgment below was clearly correct on another ground." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* §5.15 at 260 (7th ed. 1993), citing numerous cases.[6] In none of these cases did the Court vacate the judgment below.

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[6] Cook v. Hudson, 429 U.S. 165 (1976) (dismissing writ where new state statute vindicated plaintiffs' claim and recent decision removed the principal federal objection to that claim); Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (dismissing writ where statute on which plaintiffs' claim was based had been repealed, and newly enacted statute changed the potential impact of the Court's decision); Sanks v. Georgia, 401 U.S. 144 (1971) (dismissing appeal where statute had been repealed and replaced by newly enacted statute that omitted the provisions challenged as unconstitutional); Piccirillo v. New York, 400 U.S. 548 (1971) (dismissing writ after intervening state court decision vindicating petitioner's federal claim as a matter of state law); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) (dismissing writ where it appeared that the judgment below was correct on an alternate and simpler ground); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (dismissing writ where new state statute vindicated petitioner's claim); *see also* Rogers v. United States, 118 S.Ct. 673 (1998) (dismissing writ where it appeared to majority that judgment below was correct on an alternate ground that made it unnecessary to decide the constitutional issue thought to have been presented).

No matter how important the issues addressed in the opinion below, this Court "reviews judgments, not opinions." *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., concurring in denial of certiorari); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Church believes that the most recent opinion below is sound. But beyond any possibility of doubt, the *judgment* below is correct under new §548(a)(2).

If the writ had already been granted, new §548(a)(2) would have led to the writ being dismissed as improvidently granted. Because no writ has been granted, new §548(a)(2) means that the writ should now be denied. In this already protracted litigation, the Church should not be subjected to the delay and expense of a further remand that could accomplish nothing whatever except the ultimate re-entry of the same judgment.

II. Certiorari Should Have Been Denied Even If §548(a)(2) Had Not Been Rewritten.

A. There Is No Conflict With Decisions of This Court.

The petition makes the wholly insupportable accusation that the Court of Appeals is guilty of "repudiating this Court's decision" in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Pet. 6. Of course the Court of Appeals did no such thing. The Court of Appeals fully adhered to *Boerne*, but correctly concluded that this case presents fundamentally different issues.

Boerne was a case about the application of RFRA to state and local law; this was a case about the application of RFRA to federal law. This Court noted the difference at the

very beginning of its analysis: "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the states." 117 S.Ct. at 2162. Congressional power to enact RFRA as to federal law depends not on power to enforce the Fourteenth Amendment, but on powers granted in Article I.

Ignoring these obvious points about the issues presented in each case, the petition relies on out-of-context quotations about separation of powers. This Court said in *Boerne* that RFRA interfered with the Court's authority to interpret the Constitution and thus raised a separation of powers problem. 117 S.Ct. at 2172. But this conclusion was entirely derivative of the Court's interpretation of Congressional power to enforce the Fourteenth Amendment.

Boerne held that Congressional enforcement of constitutional rights must be based on the *Court's* interpretation of the underlying right. *Id.* at 2167-68. So when Congress acted to enforce its own interpretation, it simultaneously exceeded the scope of its own delegated power and usurped the Court's authority to interpret the Constitution. Both of these consequences follow from the particular delegated power at issue in *Boerne*, the power to enforce the Constitution.

No one claims that power to enforce the Fourteenth Amendment is the source of Congressional power to enact limits on the reach of the Bankruptcy Code. The power to enact this application of RFRA was based on the Bankruptcy Clause and the Necessary and Proper Clause, U.S. Const., Art. I, §§8[4] and 8[18], powers that *Boerne* had no occasion to address.

All that Congress has done in federal applications of RFRA is to limit the reach of a law that *it* enacted, over which *it* has plenary power. The bankruptcy power is not a power to enforce the Constitution, and an exercise of the bankruptcy power does not depend on anyone's interpretation of the Constitution. Congress could limit the reach of former §548(a)(2) as applied to religious contributions because it believed that such an application would be unconstitutional, or because it believed that such an application would disserve important values of religious liberty that are not embodied in the Religion Clauses, or because it believed that such an application would be bad policy for reasons having nothing to do with constitutional rights or religious liberty. Congress's reasons for acting do not matter. Because RFRA as applied to federal law does not depend on anyone's interpretation of the Constitution, federal applications do not raise the separation of powers issue addressed in *Boerne*.

As one of RFRA's leading academic critics put it:

> [T]o the extent the RFRA itself merely prescribes a rule of construction regarding the manner in which other acts of Congress are to be applied, it is unremarkable. It is simply of no consequence why Congress prescribes a rule specifying how its own statutes are to be applied.

William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291, 294 n.12 (1996).

RFRA as applied to the states was a binding command from a competing sovereign claiming superior authority; it was precisely that claim of superior authority that this Court rejected in *Boerne*. RFRA as applied to federal law is not

a claim of superior authority over anybody. It does not tell the states how to legislate, and it does not tell the courts how to interpret the Constitution. It is a Congressional attempt at self-restraint, applicable only to Congress's own legislation and the implementation of that legislation, and fully subject to amendment or repeal by any future Congress. There is no conflict between *Boerne* and the decision below.

B. There Is No Conflict With Decisions of Any Other Court of Appeals.

Two courts of appeals have now upheld the constitutionality of RFRA as applied to federal law. *In re Young*, Pet. App. A5-14 (8th Cir. 1998); *EEOC v. Catholic University*, 83 F.3d 455, 469-70 (D.C. Cir. 1996). Both cases rely on the obvious point that Congress can legislate to limit or extend the reach of laws that it has power to enact. Five courts of appeals have considered and correctly rejected Establishment Clause challenges to RFRA.[7]

There is no conflict of appellate authority on either of these issues. In her effort to create the appearance of conflict, the Trustee relies on the disagreement between the opinion below and the dissent below,[8] on decisions of Bankruptcy Courts that show no evidence of having even realized there was an issue about RFRA's application to federal law,[9] and on the absence of dicta in opinions on

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[7] In re Young, Pet. App. A14-19 (8th Cir. 1998); Mockaitis v. Harcleroad, 104 F.3d 1522, 1529-30 (9th Cir. 1997); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997); EEOC v. Catholic Univ., 83 F.3d 455, 470 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 2157 (1997).

[8] Pet. 16 n.3, *citing* Judge Bogue's dissent in this case on one side of the conflict and the majority opinion on the other.

[9] Pet. 16 n.3, *citing* Geltzer v. Crossroads Tabernacle (In re

RFRA's application to state law.[10] The petition even cites two decisions that were subsequently reversed or modified on rehearing, and then cites the reversing and modifying opinions as evidence of a conflict requiring resolution by this Court.[11] The petition is forced to such lengths for the simple reason that there is no actual conflict among the courts of appeals.

C. The Establishment Clause Issues Would Not Deserve This Court's Review Even If They Were Still Presented.

Nothing in *Boerne* suggests that RFRA violates the Establishment Clause. The City made that argument, but it attracted only one vote. 117 S.Ct. at 2172 (Stevens, J., concurring). The argument confuses the advancement of religious liberty with the advancement of religion, and it is simply not the law.

RFRA exempts religiously motivated conduct from burdensome federal regulation. This Court has unanimously upheld such exemptions against Establishment Clause attack, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327

Rivera), 214 B.R. 101, 102 n.1 (Bankr. S.D.N.Y. 1997); In re Andrade, 213 B.R. 765, 772 (Bankr. E.D. Cal. 1997).

[10] Pet. 16 n.3, *citing* Shabazz v. Parsons, 127 F.3d 1246, 1247 n.2 (10th Cir. 1997); Muhammad v. City of New York, 126 F.3d 119, 121 (2d Cir. 1997); Anderson v. Angelone, 123 F.3d 1197, 1198 n.2 (9th Cir. 1997).

[11] Pet 16 n.3, *citing* In re Saunders, 214 B.R. 524, 526 (Bankr. D. Mass. 1997), on one side of the alleged conflict, and In re Saunders, 215 B.R. 800, 803 (Bankr. D. Mass. 1997), on the other; *also citing* In re Hodge, 200 B.R. 884, 898-902 (Bankr. D. Idaho 1996), on one side of the alleged conflict, and Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge), 1998 WL 173065, *6-11 (D. Idaho, April 3, 1998), on the other.

(1987), it affirmatively invited such exemptions in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), and it reaffirmed the propriety of such exemptions in *Board of Education v. Grumet*, 512 U.S. 687, 705-06 (1994).

RFRA does not require government to subsidize religion, benefit religion, or make religion in any way better off than it would be if government had done nothing. Rather, RFRA requires only that religious conduct sometimes be left unregulated. RFRA is triggered only when federal law imposes a "substantial burden" on a religious practice, 42 U.S.C. §2000bb-1(b) (1994), and it requires only that government justify the burden or refrain from imposing it. The lower courts' interpretation of former §548(a)(2) imposed a substantial burden on innocent churches; RFRA removed that burden and left churches exactly where they would have been if Congress had not enacted former §548(a)(2) in the first place. The net effect was neutral; government had left religion where it found it. Failing to burden religion is not an establishment; government does not establish a religion by leaving it alone.

Exempting religious exercise from burdensome regulation has the secular purpose and effect of protecting liberty. *Amos*, 483 U.S. at 335-37. There is no implied endorsement; a decision to protect religious liberty implies no view about the value of religion in general or of any religion in particular. The avoidance of religious conflict and consequent human suffering, and deference to beliefs that are often far more important to the individual than to the state, are wholly adequate secular reasons for protecting religious liberty.

Exempting religious practice also avoids entanglement between church and state "and effectuates a more complete separation of the two." *Id.* at 339. If the Trustee were to

prevail in this dispute, demands for the return of contributions to churches would become a routine feature of personal bankruptcies. Churches would regularly be parties to litigation in the Bankruptcy Court; trustees would regularly subpoena church contribution records. Bankruptcy courts would have to decide which contributions were in exchange for religious benefits and which were not, because "many religious contributions" would be "'in exchange for' church services," even if the contributions here were not. *In re Young*, Pet. App. A69-71 (8th Cir. 1996) (Beam, J., concurring in denial of rehearing en banc). Worst of all, some churches would become embroiled in collection proceedings, unable to pay the amount of contributions that they have long since spent, and vulnerable to execution, garnishment, discovery of assets, and other coercive proceedings. RFRA avoided all of these entanglements.

RFRA's evenhanded generality serves even more important values of the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Congress minimized the risk of denominational preference by enacting a general standard exempting all religious practices from all substantial and unjustified regulatory burdens. RFRA's generality avoids this Court's suspicions of narrow legislative exemptions that benefit only one or a few religious groups. *Compare Grumet*, 512 U.S. at 703 (rejecting an accommodation because of its "anomalously case-specific nature"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (distinguishing general religious exemptions from exemptions that protect a single religious practice).

The Trustee claims that RFRA was invalid as applied in this case, because it forced creditors to give money to the

debtors' church. The parties fully agree that government cannot coerce support for religion. But plainly that has not happened here.

It was unambiguously the debtors who gave money to the Church. It was the debtors' choice -- not the creditors' and not the government's -- that resulted in money going to the Church. The question is not whether the creditors must support the Church, but whether they can reach inside the Church, reverse a voluntary religious act, and demand that the Church help pay the creditors of a member's failed business.

The creditors extended credit to the debtors or to their business, fully aware that the debtors would control the funds, that debtors dissipate funds in a myriad of ways, and that there was a risk the loans would not be repaid. Creditors charge interest for assuming that risk. The creditors' loss is the same whether the money was dissipated through bad luck, bad business decisions, frivolous consumption, contributions to the Church, or any other way. The creditors have no more been coerced to support the debtors' religious choices than they were coerced to support the debtors' residential or recreational choices. The choice to support the Church was made by the debtors, and the creditors assumed the risk of the debtors' choices.

This Court has recognized the importance of such intervening private choices even in the context of government programs directing tax money to a narrow range of private institutions, many of which turn out to be religious.[12] In the school cases, parental rights to choose

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[12] *See* Agostini v. Felton, 117 S.Ct. 1997 (1997); Rosenberger v. Rector of University of Virginia, 515 U.S. 819 (1995); Zobrest v.

among schools insulated the government's decision to support schools from the parents' decision to direct that support to religious schools. This is an *a fortiori* case, for the debtors' power to spend their own funds prior to bankruptcy extends to every imaginable expenditure in the global economy. The connection between the creditors and any particular expenditure of funds by the debtors is far more attenuated than the connection between the government in the school cases and the parents' decision to use the government funds at religious schools.

Nor was it the case that the creditors would have been legally entitled to this money if only it had not been given to the Church. The opposite is true: the creditors claimed this money *because* it was given to the Church. If the money had not been given to the Church, the odds are high that it would have been spent some other way, in a transaction that produced no benefit for creditors but which the Trustee could not challenge.

D. The Church Is Entitled to Defend the Judgment on the Basis of Issues That Can Never Arise Again.

The Church has long argued that the Trustee and the courts below misinterpreted former §548(a)(2), and that so interpreted, former §548(a)(2) was unconstitutional. Either of these grounds would be sufficient to support the judgment below, and the Church is entitled to defend the judgment on any ground that will support it.[13] But neither of these

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Catalina Foothills School District, 509 U.S. 1 (1993); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

[13] *See, e.g.*, Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984); Washington v. Confederated Bands, 439 U.S. 463, 476 n.20 (1979).

issues can ever arise again; both are focused on the former §548(a)(2), which no longer applies to charitable contributions.

1. The Contributions Were Not Recoverable Under Former §548(a)(2).

Section 548 authorizes the Trustee to recover certain transfers of a debtor's property not in exchange for reasonably equivalent value. Courts have sensibly interpreted "value" to include any thing of value, including entertainment,[14] services,[15] and executory promises.[16]

The Court of Appeals assumed, Pet. App. A46 & n.4, and the Bankruptcy Court found, *id.* at A114 n.7, that the debtors received valuable services from the Church. The Court of Appeals assumed that the value of these services was reasonably equivalent to the contributions. *Id.* at A46 & n.4. But the court concluded that the equivalent value the debtors received from the Church was not "in exchange for" the debtors' contributions. *Id.* at A46-47 (8th Cir. 1996). That is, the courts below believed that the debtors could and should have taken advantage of the Church, consuming its services without contributing to the cost of producing those services.

This interpretation was error.[17] If members

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[14] In re Chomakos, 69 F.3d 769, 772 (6th Cir. 1995).

[15] In re Investors Funding Corp., 523 F. Supp. 533, 549 (S.D.N.Y. 1980).

[16] In re Young, Pet. App. A114-18 (Bankr. D. Minn. 1992) (collecting authorities).

[17] *See* In re Young, Pet. App. A69-71 (8th Cir. 1996) (Beam, J., concurring in denial of rehearing en banc); In re Moses, 59 B.R. 815, 818-19 (Bankr. N.D. Ga. 1986); In re Missionary Baptist Foundation, 24

collectively did not contribute, the Church could not exist, and the debtors would have received no valuable religious services from the Church. The debtors contributed their fair share, calculated in accordance with their understanding of religious obligation, to the cost of services that they valued highly. The congregation and each member received religious services in exchange for the congregation's, and therefore each member's, contributions. This transaction is different in kind from the fraudulent transactions that former §548(a)(2) was designed to detect.

If the debtors had merely *promised* to contribute, the Church's expenditure of funds in reliance on the promise would have made the promise enforceable.[18] Such charitable subscriptions are enforceable in nearly every state, without reliance or with thin or fictional reliance.[19] If reliance on a mere promise to make a charitable contribution creates an enforceable exchange at common law, then *a fortiori*, reliance on a completed charitable contribution is an

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B.R. 973, 979 (Bankr. N.D. Tex. 1982).

[18] Rochester Civic Theatre, Inc. v. Ramsay, 368 F.2d 748, 751 (8th Cir. 1966) (Minnesota law); In re Stack's Estate, 204 N.W. 546 (Minn. 1925); Albert Lea College v. Brown's Estate, 93 N.W. 672 (Minn. 1903).

[19] *See* Restatement (Second) of Contracts §90(2) (1981) (enforceable without reliance); Annotation, *Lack of Consideration as Barring Enforcement of Promise to Make Charitable Contribution or Subscription--Modern Cases*, 86 A.L.R.4th 241 (1991 & Supp.) (collecting cases); John D. Calamari & Joseph Perillo, *The Law of Contracts* §6-2(d) at 279-81 (3d ed. 1987); Arthur Linton Corbin, 1A *Contracts* §198 at 203-13 (2d ed. 1963); Samuel Williston, 1 *A Treatise on the Law of Contracts* §116 at 473-80 (3d ed. 1957); Edith L. Fisch, Doris Jonas Freed, & Esther R. Schachter, *Charities and Charitable Foundations* §63 at 77 (1974).

exchange. Here the debtors made their customary contributions, week after week, and the Church relied in the most emphatic and unambiguous way -- it spent the money on services that the debtors used and valued. The conclusion below that there was no exchange is thus inconsistent with long recognized common law principles.

Two rules of interpretation further highlight the misinterpretation below. First, former §548(a)(2) should not have been interpreted "to disrupt the ancient harmony" of long settled understandings of proper behavior by debtors and creditors. *BFP v. Resolution Trust Co.*, 511 U.S. 531, 543 (1994). Second, no federal law should be interpreted to burden religious exercise in the absence of an affirmatively expressed Congressional intent to impose such a burden. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). If the courts below had followed these sound rules of interpretation, the Religious Liberty and Charitable Donation Protection Act might never have been necessary.

2. The Court of Appeals' Interpretation of Former §548(a)(2) Violated the Free Exercise Clause.

The Court of Appeals' interpretation of former §548(a)(2) turned on the phrase "in exchange for" -- it held that the debtors' contributions were not in exchange for the value the debtors received from the Church. Pet. App. A46-47 (8th Cir. 1996). This interpretation placed contributions to churches in a narrow and disadvantaged class, outside the generally applicable rules of the Bankruptcy Code.

The requirements of the Free Exercise Clause are set out in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div. v. Smith*, 494 U.S. 872 (1990). The threshold requirements of

Smith and *Lukumi* are that the law be "neutral" and "generally applicable".

The requirement of "general applicability" is not a motive test; it is a test of objectively "unequal treatment."[20] If a law allows secular exemptions, government must have a compelling reason for not allowing religious exemptions. *Smith*, 494 U.S. at 884.

Lukumi applies and expands these principles. *Lukumi* holds that if a regulation applies to religious conduct, and does not apply to similar secular conduct, this discrimination requires compelling justification. *See* 508 U.S. at 535-38, 543-45. Even if the unregulated secular conduct is different from the religious conduct, the law requires compelling justification if the unregulated secular conduct and the regulated religious conduct cause analogous harms. *See id.* at 543 ("The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree"); *id.* at 538-39, 544-45 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice).

For similar reasons, the Trustee could not arbitrarily confine the inquiry here to the four corners of former §548(a)(2). She could not prevail with the circular argument that former §548(a)(2) was generally applicable to whatever it applied to. Nor could she just assert that contributions to churches were "different" from other expenditures that take value away from creditors, most of which were outside the scope of former §548(a)(2).

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[20] *Lukumi*, 508 U.S. at 542, quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring); *see Lukumi*, 508 U.S. at 540-42 (Kennedy, J.) (part of opinion based on motive drew only two votes).

Former §548(a)(2) as interpreted below discriminated against religious exercise in multiple ways. At the level of the Church, every membership organization must raise money to support its operations. Secular clubs generally charge dues for membership and fees for services; members who do not pay are excluded. Thus, if the debtors had paid the money at issue to their country club, the Court of Appeals would have recognized the transfer as a payment in exchange for club membership and club services.

The debtors' contributions to their church serve the same economic function for the Church as payments of dues and fees to a country club: they enable the organization to meet its expenses. The difference between the two financing systems has no economic significance in this context, but it has profound religious significance. Churches cannot exclude those who fail to pay; such a policy would eliminate evangelism and charitable works, and thus fundamentally change the mission of most churches. So the Court of Appeals interpreted former §548(a)(2) to apply to religious contributions because of--*solely and precisely because of*--a practice that is essential to the mission and structure of churches.

The Court of Appeals' interpretation of former §548(a)(2) also discriminated against religious exercise at the level of the debtors, creating two sets of rules about what debtors could do with their property in the year preceding bankruptcy. The generally applicable rule in bankruptcy is that debtors control the disposition of their funds prior to bankruptcy. Debtors can and do spend their money in all sorts of ways that produce value to them, but no value to their creditors. Indeed, this pattern of spending is the essence of why debtors go bankrupt.

These other expenditures that produce no value for creditors cause the same harm as contributions to churches -- they dissipate assets that might have been used to pay creditors. But they are not fraudulent transfers recoverable by trustees in bankruptcy, even in extreme cases. Thus, debtors who gamble their money away in casinos have not committed a fraudulent transfer. *In re Chomakos*, 69 F.3d 769 (6th Cir. 1995). Debtors who waste their money on travel, fine meals, alcohol, or prostitutes all receive something in return, and thus have not committed fraudulent transfers. *Id.* at 772. Debtors who foolishly pour more and more money into a hopeless business venture destroy any value that might have been available to their creditors, but they have not committed a fraudulent transfer. *See In re Universal Clearing House Co.*, 60 B.R. 985, 997-1000 (D. Utah 1986), where debtor's business was a Ponzi scheme.

The generally applicable rule is that the Bankruptcy Code protects the debtors' discretion to use their own money prior to bankruptcy. The result is that some 96% of chapter 7 bankruptcies are no-asset cases.[21] The point is not merely the empirical fact that most debtors have no non-exempt assets. Rather, the empirical fact demonstrates the pervasiveness of the general rule permitting debtors to dissipate their assets prior to filing for bankruptcy. Just about the only thing many debtors wanted to do but could not do was contribute to their church.

The dominance of no-asset cases also shows that non-tithing debtors dissipate their funds in other ways; there is no basis to believe that the creditors would get more if debtors

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[21] Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. Rich. L. Rev. 303, 310-11 & n.30 (1988) (reporting local and national data).

were prevented from giving to their church, and thus no basis to believe that the creditors' money somehow went to the Church or that exempting religious contributions from former §548(a)(2) would somehow force creditors to support churches. To the contrary: creditors would benefit from applying former §548(a)(2) to churches only if debtors *do* make contributions and thus enable trustees to sue solvent churches in the place of insolvent debtors. Former §548(a)(2) as interpreted in this case would make churches the principal source of funds for distribution in consumer bankruptcies. As Judge Bogue noted in dissent, this liability would be "one of the creditor's *few* protections." Pet. App. A65 (Bogue, J., dissenting) (emphasis added). But even if it had wanted to, Congress could not put the religious practice of tithing in a narrow exception to the general rule of the bankruptcy system, burdening tithing to provide an unusual protection for creditors, when it was mostly unwilling to burden secular transactions to provide more general protections for creditors.

E. Even If New §548(a)(2) Did Not Control This Case, None of the Other Issues Would Be Ripe for This Court's Review.

As noted, there is no split in the circuits on any issue in the case. No other court of appeals has even considered the interpretation of former §548(a)(2) in the context of good faith contributions to a church or charity. No other court of appeals ever will, now that new §548(a)(2) has been enacted. No court of appeals -- not even the court below -- has considered or ever will consider the Church's free exercise attack on the Trustee's interpretation of former §548(a)(2).

Even if new §548(a)(2) did not exist, the judgment below could be defended on so many alternate grounds that

the Court could not have any confidence of reaching the issue it granted certiorari to decide.

No court anywhere has considered the meaning of new §548(a)(2). But on these facts there is no ambiguity to consider. New §548(a)(2) unambiguously controls this case, and it ensures that no other issue could be reached.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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June 22, 1998

Religious Liberty and Charitable Donation Protection Act of 1998

An Act

To amend title 11, United States Code, to protect certain charitable contributions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Religious Liberty and Charitable Donation Protection Act of 1998'.

SEC. 2. DEFINITIONS.

Section 548(d) of title 11, United States Code, is amended by adding at the end the following:

"(3) In this section, the term 'charitable contribution' means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

"(A) is made by a natural person; and

"(B) consists of--

"(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

"(ii) cash.

"(4) In this section, the term 'qualified religious or charitable entity or organization' means--

"(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

"(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.".

SEC. 3. TREATMENT OF PRE-PETITION QUALIFIED CHARITABLE CONTRIBUTIONS.

(a) IN GENERAL-Section 548(a) of title 11, United States Code, is amended--

(1) by inserting "(1)" after "(a)";

(2) by striking "(1) made" and inserting "(A) made";

(3) by striking "(2)(A)" and inserting "(B)(i)";

(4) by striking "(B)(i)" and inserting "(ii)(I)";

(5) by striking "(ii) was" and inserting "(II) was";

(6) by striking "(iii)" and inserting "(III)"; and

(7) by adding at the end the following:

"(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

"(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

"(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.".

(b) TRUSTEE AS LIEN CREDITOR AND AS SUCCESSOR TO CERTAIN CREDITORS AND PURCHASERS- Section 544(b) of title 11, United States Code, is amended--

(1) by striking "(b) The trustee" and inserting "(b)(1) Except as provided in paragraph (2), the trustee"; and

(2) by adding at the end the following:

"(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.".

(c) CONFORMING AMENDMENTS- Section 546 of title 11, United States Code, is amended--

(1) in subsection (e)--

(A) by striking "548(a)(2)" and inserting "548(a)(1)(B)"; and

(B) by striking "548(a)(1)" and inserting "548(a)(1)(A)";

(2) in subsection (f)--

(A) by striking "548(a)(2)" and inserting "548(a)(1)(B)"; and

(B) by striking "548(a)(1)" and inserting "548(a)(1)(A)"; and

(3) in subsection (g)--

(A) by striking "section 548(a)(1)" each place it appears and inserting "section 548(a)(1)(A)"; and

(B) by striking "548(a)(2)" and inserting "548(a)(1)(B)".

SEC. 4. TREATMENT OF POST-PETITION CHARITABLE CONTRIBUTIONS.

(a) CONFIRMATION OF PLAN- Section 1325(b)(2)(A) of title 11, United States Code, is amended by inserting before the semicolon the following: ", including charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made".

(b) DISMISSAL- Section 707(b) of title 11, United States Code, is amended by adding at the end the following: "In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).".

SEC. 5. APPLICABILITY.

This Act and the amendments made by this Act shall apply to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act.

SEC. 6. RULE OF CONSTRUCTION.

Nothing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb (sic) et seq.).

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

United States Code Sections Amended by Religious Liberty and Charitable Donation Protection Act of 1998

TITLE 11, UNITED STATES CODE

* * * * * * *

CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE

* * * * * * *

SUBCHAPTER III--THE ESTATE

* * * * * * *

Sec. 544. Trustee as lien creditor and as successor to certain creditors and purchasers

* * * * * * *

~~(b) The trustee~~ *(b)(1) Except as provided in paragraph (2), the trustee* may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

* * * * * * *

Sec. 546. Limitations on avoiding powers

* * * * * * *

(e) Notwithstanding sections 544, 545, 547, ~~548(a)(2)~~ *548(a)(1)(B)*, and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section ~~548(a)(1)~~ *548(a)(1)(A)* of this title.

(f) Notwithstanding sections 544, 545, 547, ~~548(a)(2)~~ *548(a)(1)(B)*, and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section ~~548(a)(1)~~ *548(a)(1)(A)* of this title.

(g) Notwithstanding sections 544, 545, 547, ~~548(a)(2)~~ *548(a)(1)(B)* and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap agreement and that is made before the commencement of the case, except under section ~~548(a)(1)~~ *548(a)(1)(A)* of this title.

* * * * * * *

Sec. 548. Fraudulent transfers and obligations

(a) *(1)* The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

~~(1)~~ *(A)* made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

~~(2)(A)~~ *(B)(i)* received less than a reasonably equivalent value in exchange for such transfer or obligation; and

~~(B)(i)~~ *(ii)(I)* was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

~~(ii)~~ *(II)* was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

~~(iii)~~ *(III)* intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization

shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

* * * * * * *

(d)(1)

* * * * * * *

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

* * * * * * * *

CHAPTER 7--LIQUIDATION

* * * * * * * *

Sec. 707. Dismissal

* * * * * * * *

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. *In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).*

* * * * * * * *

CHAPTER 13--ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

* * * * * * *

SUBCHAPTER II--THE PLAN

* * * * * * *

Sec. 1325. Confirmation of plan

* * * * * * *

(b)(1)

* * * * * * *

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended--

(A) for the maintenance or support of the debtor or a dependent of the debtor, *including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made*; and

* * * * * * *

Uncodified Provisions of the Act

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Liberty and Charitable Donation Protection Act of 1998".

SEC. 5. APPLICABILITY.

This Act and the amendments made by this Act shall apply to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act.

SEC. 6. RULE OF CONSTRUCTION.

Nothing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb (sic) et seq.).

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No. 97-1744

In the Supreme Court of the United States

OCTOBER TERM, 1997

JULIA A. CHRISTIANS, PETITIONER

v.

CRYSTAL EVANGELICAL FREE CHURCH

and

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States intervened in this action solely to defend the constitutionality of the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* The United States therefore addresses only the following issue:

Whether the Religious Freedom Restoration Act is constitutional as applied to federal bankruptcy law.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 141 F.3d 854. The district court's opinion (Pet. App. A72-A103) is reported 152 B.R. 939. The decision of the Bankruptcy Court (Pet. App. A104-A128) is reported at 148 B.R. 886. The prior decision of the court of appeals (Pet. App. A30-A67) is reported at 82 F.3d 1407, and the order denying rehearing of that decision (Pet. App. A68-A71) is reported at 89 F.3d 494. This Court's order vacating and remanding to the court of appeals (Pet. App. A29) is reported at 117 S. Ct. 2502.

JURISDICTION

The court of appeals entered its judgment on April 13, 1998. The petition for a writ of certiorari was filed on April 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. At the time this action was commenced, the Bankruptcy Code authorized the trustee for a bankrupt estate to "avoid any transfer of an interest of the debtor" that was made within one year of the filing of the bankruptcy petition if, among other things, the debtor "received less than a reasonably equivalent value in exchange for such transfer" and the debtor was insolvent at the time. 11 U.S.C. 548(a)(2). "Value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. 548(d)(2)(A).

On June 19, 1998, the Religious Liberty and Charitable Donation Protection Act of 1998 (Donation Act), Pub. L. No. 105-183, 112 Stat. 517, became law.[1] The Donation Act excludes certain charitable and religious donations from the trustee's power to void transfers under 11 U.S.C. 548. As relevant here, the Donation Act amends 11 U.S.C. 548(a) to provide that:

> A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B)[2] in any case in which—

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[1] The text of the Donation Act is reproduced in an addendum to the Church's Brief in Opposition.

[2] The Donation Act also renumbers the preceding provisions of Section 548(a). Subsection (1)(B) refers to the trustee's authority to void a transfer that was not made for reasonably

> (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or
>
> (B) the contribution made by the debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

§ 3(a), 112 Stat. 517-518. The Donation Act defines "charitable contribution" as a contribution covered by Section 170(c) of the Internal Revenue Code, 26 U.S.C. 501(c) (1986), if the contribution is made by a natural person and consists of a financial instrument or cash. § 2, 112 Stat. 517. A "qualified religious or charitable entity or organization" also is defined by reference to Section 170 of the Internal Revenue Code. *Ibid.*

The Act applies "to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act." § 5, 112 Stat. 518-519.

b. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42

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equivalent value (which was previously codified as 11 U.S.C. 548(a)(2)(A)).

U.S.C. 2000bb-1. The "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4).

A person whose rights under RFRA have been violated "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c). RFRA identifies the "government[s]" subject to its terms as including any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. 2000bb-2(1). RFRA also applies to all territories and possessions of the United States. 42 U.S.C. 2000bb-2(2). RFRA's coverage embraces "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA's enactment. 42 U.S.C. 2000bb-3(a).[3]

Congress enacted RFRA following this Court's decision in *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In enacting RFRA, Congress expressed concern about the effect of the *Smith* decision on the exercise of religion and, in particular, on minority religions. 42 U.S.C. 2000bb(a). Congress, accordingly, passed RFRA to establish, as a matter of statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases

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[3] All federal laws enacted after RFRA's passage are subject to its terms "unless such law explicitly excludes such application." 42 U.S.C. 2000bb-3(b). The Donation Act contains a rule of construction, which provides that "[n]othing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993." § 6, 112 Stat. 519.

where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1).

In passing RFRA, Congress relied upon its authority under Section 5 of the Fourteenth Amendment to make RFRA applicable to the States. With respect to federal law, Congress invoked its substantive powers under Article I, Section 8 of the Constitution in conjunction with its authority under the Necessary and Proper Clause, U.S. Const., Art. I, § 8, Cl. 18. S. Rep. No. 111, 103d Cong., 1st Sess. 13-14 (1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993).

2. Bruce and Nancy Young (debtors) filed a Chapter 7 bankruptcy petition in 1992. Pet. App. A3. In the year preceding that filing, the debtors contributed $13,450 in tithes to the Crystal Evangelical Free Church. *Id.* at A135. The Youngs were insolvent at the time they made those contributions. As a result, petitioner, who is the trustee appointed in the debtor's bankruptcy case, initiated the present proceeding against the Church to recover the contributions as avoidable transfers under 11 U.S.C. 548(a)(2)(A). Pet. App. A3.

The Bankruptcy Court granted petitioner's motion for summary judgment, holding that the contributions were voidable under Section 548. Pet. App. A104-A128. The District Court affirmed. *Id.* at A72-A103.

The Church appealed. During the pendency of that appeal, Congress enacted RFRA. The court of appeals subsequently held that the debtor's tithes were avoidable transfers within the meaning of Section 548, but that RFRA precluded petitioner from seeking to recover those transfers from the Church. Pet. App. A30-A60. The parties did not raise, and the court of

appeals did not address, the constitutionality of RFRA. *Id.* at A51.[4]

3. In *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), this Court held that Congress lacked the authority under Section 5 of the Fourteenth Amendment to impose RFRA upon state and local governments. *Id.* at 2162-2172. The Court explained that Congress's power under Section 5 is "remedial" and "preventive," extending only to enforcing the constitutional protections embodied in the Fourteenth Amendment, as defined by this Court. *Id.* at 2164, 2169. Congress cannot employ its Section 5 enforcement powers to "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* at 2164. The Court noted that "[t]he design of the Fourteenth Amendment has proved significant * * * in maintaining the traditional separation of powers," because Congress's enforcement powers are limited by the Court's predicative authority to interpret the scope of the constitutional rights that Congress may protect. *Id.* at 2166.

The Court concluded that RFRA is not "remedial, preventive legislation," because its provisions "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted" by the Court. *Flores*, 117 S. Ct. at 2170, 2171. Accordingly, the Court concluded that RFRA would impermissibly "intru[de] into the States' traditional prerogatives and general authority to regulate for the

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[4] The United States intervened in the court of appeals to defend against the Church's arguments that Section 548 of the Bankruptcy Code is unconstitutional. The United States withdrew that intervention shortly before oral argument in the case.

health and welfare of their citizens," *id.* at 2171, and thus could not "be considered enforcement legislation under § 5 of the Fourteenth Amendment," *id.* at 2168.

Petitioner filed a petition for a writ of certiorari. This Court vacated the judgment of the court of appeals and remanded for further consideration in light of *Flores*. Pet. App. A29.

4. On remand, the United States intervened to defend the constitutionality of RFRA as applied to the federal government and federal law. The court of appeals ruled that RFRA is constitutional as applied to federal bankruptcy law. The court noted that "the *Flores* Court did not address whether Congress could, pursuant to its Article I authority, constitutionally impose RFRA on *federal* law." Pet. App. A8. The court concluded that RFRA falls within Congress's broad, substantive power under Article I of the Constitution—in this case the Bankruptcy Clause as augmented by the Necessary and Proper Clause. *Id.* at A12-A14.[5]

The court of appeals further held that RFRA does not violate the separation of powers. The court noted that, while Congress may not amend the Supreme Court's authoritative interpretation of the Constitution, Congress may offer additional protection in the federal sphere to constitutional rights as long as Congress legislates pursuant to its recognized powers under Article I. Pet. App. A10-A11. Finally, the court of appeals held that RFRA does not violate

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[5] The court of appeals held that the portion of RFRA applicable to federal law is severable from the portion applicable to the States that was invalidated in *Flores*. Pet. App. A9. Petitioner does not seek this Court's review of that aspect of the court of appeals' decision.

the Establishment Clause of the First Amendment. *Id.* at A17-A19.

ARGUMENT

Petitioner seeks this Court's review of whether RFRA is constitutional as applied to federal bankruptcy law. Pet. 6-26. Because intervening legislation separately supports the judgment of the court of appeals and eliminates the basis for petitioner's recoupment action, the question presented is of no continuing relevance to this case or any analogous case. Furthermore, the decision of the court of appeals is correct and does not conflict with the established law of any other circuit or of this Court. Accordingly, this Court's review is not warranted.

1. Congress's recent enactment of the Donation Act eliminates the basis for petitioner's action and renders the question of RFRA's application to this case of no further relevance. This Court "reviews judgments, not opinions." *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 n.11 (1986) (opinion of Stevens, J.). There can be no substantial doubt that the judgment of the court of appeals in the present case is correct and, indeed, compelled by the Donation Act.

The Donation Act forbids petitioner from recovering under Section 548 of the Bankruptcy Code any religious or charitable contribution that does not exceed fifteen percent of the debtors' gross annual income or that is consistent with the debtors' established practice in making religious or charitable contributions. § 3(a)(2), 112 Stat. 517-518. The undisputed facts of this case (see Pet. App. A3, A135-A137) leave no doubt that the debtors' donations satisfy that statutory standard. The debtors gave ten percent of

their gross income to the Church, which is well within the fifteen percent limit set by subsection (a). *Id.* at A3, A32, A105, A135. In addition, the debtors' payment of the tithes was consistent with their established pre-bankruptcy donation practice. *Id.* at A3, A32, A105. And there can be no serious argument that the Church is not a "qualified religious or charitable entity or organization," within the meaning of the Donation Act, § 3(a), 112 Stat. 517-518. To the contrary, arguments earlier in the litigation over whether the donations could be recovered under the former Section 548 presumed the Church's qualifying status under the Internal Revenue Code. See Pet. App. A86-A87, A123-A124. Finally, the Donation Act plainly applies to all pending cases. § 5, 112 Stat. 518-519.

In short, the Donation Act eliminates the basis for petitioner's recoupment action and the Church's need to invoke RFRA. A decision on the constitutionality of RFRA would have no effect on these parties or on the outcome of this (or any analogous) litigation.

Furthermore, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [this Court] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979); see also *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). To that end, "[b]efore deciding the constitutional question" presented by petitioner, it would be "incumbent on [this Court] to consider whether the statutory grounds might be dispositive." *Beazer*, 440 U.S. at 582. Because the terms of the Donation Act are clear and unquestionably implicated by the pre-

sent case, it is extremely unlikely that granting the petition would result in this Court's consideration of the constitutional question presented.

2. Even were the Donation Act not dispositive of the present litigation, the decision of the court of appeals would not merit this Court's review.

a. The decision of the court of appeals does not conflict with the established law of any other circuit. To the contrary, the court's ruling is the first post-*Flores* appellate decision to address and specifically decide the validity of RFRA as it applies to federal law.[6] The only pre-*Flores* court of appeals decision to address RFRA's validity in the federal sphere, moreover, also ruled that RFRA is a valid exercise of Congress's power under Article I, and rejected the contention that RFRA violates the Establishment Clause and the separation of powers. *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 469-470 (D.C. Cir. 1996) ("We doubt that [a party] would argue that Congress

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[6] Since *Flores*, two unpublished memoranda dispositions have stated broadly, in cases involving the federal government, that *Flores* rendered RFRA unconstitutional. See *United States* v. *Dee*, 122 F.3d 1074 (9th Cir. 1997) (Table), petition for writ of cert. pending, No. 97-8677 (filed Apr. 13, 1998); *Patel* v. *United States*, 132 F.3d 43 (10th Cir. 1997) (Table). Those decisions do not create a genuine inter-circuit conflict because the unpublished rulings have no precedential force, are not law of the circuit, and provide no indication of how the Ninth or Tenth Circuit will rule when squarely presented with the question of RFRA's continued applicability to the federal government. See 9th Cir. R. 36-2, 36-3; 10th Cir. R. 36.3. At least two other courts of appeals have noted, but reserved, the question. *Alamo* v. *Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998) (assuming RFRA's continued application to the federal government); *United States* v. *Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997).

lacks at least the facial authority to determine against whom, and under what circumstances, Title VII and other laws will be enforced.").

All of the other court of appeals' decisions cited by petitioner (Pet. 16-17 n.3) either pre-date *Flores* or involve RFRA's applicability to state law.[7] None of those cases, therefore, remotely conflicts with the ruling of the court of appeals in this case. Petitioner's additional citation of a few conflicting bankruptcy court decisions (*ibid.*) does not necessitate this Court's review because the recent enactment of the Donation Act resolves the substance of the conflict and ensures that it will not arise again. In any event, uniformity of bankruptcy court decisions should be policed by the district courts and courts of appeals in the first instance.[8]

b. The ruling of the court of appeals is also consistent with this Court's decision in *Flores*. *Flores* involved the application of RFRA to a local ordinance. As a result, the sole issue before the Court was the validity of "the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States." *Flores*, 117 S. Ct. at 2162.

Central to the Court's holding was the determination that Congress's power under Section 5 of the

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[7] See *Shabazz* v. *Parsons*, 127 F.3d 1246 (10th Cir. 1997) (addressing RFRA's applicability to state law); *Muhammad* v. *City of New York Dep't of Corrections*, 126 F.3d 119 (2d Cir. 1997) (same); *Anderson* v. *Angelone*, 123 F.3d 1197 (9th Cir. 1997) (same); *Montano* v. *Hedgepeth*, 120 F.3d 844 (8th Cir. 1997) (same); *Sasnett* v. *Sullivan*, 91 F.3d 1018 (7th Cir. 1996) (pre-*Flores* decision upholding RFRA's constitutionality as applied to the States), vacated, 117 S. Ct. 2502 (1997).

[8] Petitioner's references to disputes among legal scholars (Pet. 17-18 n.4, 26 n.7), provide no basis for this Court's review.

Fourteenth Amendment may be exercised only to remedy or prevent a violation of the substance of that Amendment, as defined by this Court. See 117 S. Ct. at 2166-2167. It was in that narrow context that the separation of powers was addressed. *Id.* at 2166 ("The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary."). As the opinion makes clear, however, the separation of powers principle implicit in Section 5 to which the Court referred means only that when the scope of Congress's legislative authority is confined to enforcing constitutional rights, Congress can only remedy or prevent state conduct that would cross the constitutional boundaries set by this Court. *Id.* at 2166-2168. In other words, the separation of powers requires that the predicative risk of a constitutional violation by the States must be identified by reference to this Court's articulation of the scope of that right. *Ibid.*; see also *id.* at 2171-2172 (explaining that RFRA exceeds Congress's Section 5 power because the remedy it imposes is out of proportion to the risk of actual constitutional violations under *Smith*).

When considered in context, *Flores*' abbreviated discussion of the separation of powers has nothing to do with RFRA's applicability to federal law or to the federal government. Nothing in *Flores* purported to address or limit Congress's legislative powers under Article I. Congress's Article I powers, moreover, are not simply remedial and preventive; they are broad and substantive. Nor is Congress's legislative authority under Article I dependent upon this Court's predicate findings about the scope of the Bill of Rights. As long as Article I legislation adheres to the constitutional floor established by this Court (and

there can be no serious argument that RFRA offers less protection than *Smith*) and does not transgress other constitutional limitations (such as the Establishment Clause, discussed pp. 18-23, *infra*, or the Due Process Clause), the separation of powers is not implicated. See *INS* v. *Chadha*, 462 U.S. 919, 941 (1983) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, * * * so long as the exercise of that authority does not offend some other constitutional restriction.").

In fact, if the *Flores* Court had, as petitioner suggests, indirectly and unnecessarily reached out to decide the constitutionality of RFRA as applied to federal law, that action would have violated established principles of constitutional adjudication, which themselves embody important and fundamental separation of powers values. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (where more than one argument is presented, the Court must decide the question of Congress's power to enact legislation on the narrowest possible ground); *Beazer*, 440 U.S. at 582 n.22 (Court must not decide constitutional questions "in advance of the necessity of deciding them" or "in broader terms than are required by the precise facts to which the ruling is to be applied"); *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring) (because of "the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress," the Court has established a number of principles limiting the circumstances and manner in which such review will be undertaken). This Court did no such thing.

3. The decision of the court of appeals is correct and consistent with this Court's separation of powers and Establishment Clause precedents.

a. The court of appeals correctly concluded that, in the present context, RFRA is a proper exercise of Congress's Article I powers under the Bankruptcy and Necessary and Proper Clauses. Congressional power under the Bankruptcy Clause[9] is "plenary and exclusive." *United States* v. *Kras*, 409 U.S. 434, 447 (1973). Congress may "embrace within its legislation whatever may be deemed important to a complete and effective bankrupt[cy] system." *United States* v. *Fox*, 95 U.S. 670, 672 (1877). The bankruptcy power:

> extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

Hanover Nat'l Bank v. *Moyses*, 186 U.S. 181, 186 (1902).

The bankruptcy power is augmented by the Necessary and Proper Clause.[10] That Clause vests Congress with the authority to adopt "all means which are appropriate" and are "calculated to effect any of the objects entrusted to the [federal] government"

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[9] The Bankruptcy Clause vests Congress with power to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8, Cl. 4.

[10] The Necessary and Proper Clause provides that Congress may "make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers [under Article I, section 8], and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8, Cl. 18.

through its enumerated powers. *M'Culloch* v. *Maryland* 17 U.S. (4 Wheat.) 316, 421, 423 (1819). Congress thus may "exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government." *Id.* at 420.[11]

Congress's plenary authority under the Bankruptcy and the Necessary and Proper Clauses includes the power to determine that the bankruptcy system shall be operated in a manner that is consistent with congressional policy choices. Just as it has accorded special protections to debtors' medical and educational needs, Congress has the power under the Bankruptcy Clause to mandate that the trustee, in marshaling and liquidating the debtor's assets, act in a manner that does not substantially burden the debtor's religious exercise, unless doing so would be narrowly tailored to advance a compelling federal interest.

Congress's use here of an Article I power to protect religious liberty is by no means unique. In conjunction with its power to "lay and collect Taxes," U.S. Const., Art. I, § 8, Cl. 1, Congress has chosen to provide tax-exempt status to religious organizations.

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[11] Petitioner argues (Pet. 12) that, even if RFRA falls within an enumerated power under Article I, Section 8, the statute must separately satisfy the three-part test commonly applied under the Necessary and Proper Clause in order to pass constitutional muster. The Necessary and Proper Clause, however, serves "to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." *M'Culloch*, 17 U.S. at 420. RFRA, moreover, clearly passes that test because the protection of religious freedom is a legitimate legislative end; RFRA does not violate any other constitutional provision; and it is an appropriate and reasonable method of achieving Congress's legislative goal. *Id.* at 421.

See 26 U.S.C. 501(c)(3) (Supp. II 1996); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 585-592 (1983). In addition, Congress has enacted legislation exempting from the Social Security tax self-employed members of religious sects who are religiously opposed to accepting governmental benefits, 26 U.S.C. 1402(g), even though this Court has held that the Free Exercise Clause does not require such accommodation, *United States* v. *Lee*, 455 U.S. 252 (1982).

Congress has also used its war powers and its commerce power to enact legislation requiring the accommodation of religious exercise. See, *e.g.*, 10 U.S.C. 774 (permitting military service members to wear religious apparel while in uniform under certain circumstances); 42 U.S.C. 2000e(j) (Commerce Clause legislation requiring private employers reasonably to accommodate employees' religious exercise).

b. Petitioner errs in contending (Pet. 12-15) that RFRA cannot be proper Article I legislation because it affords more protection for religious liberty than the Constitution requires and thus violates the separation of powers. Legislative enactments that, like RFRA, respond to decisions of this Court by creating enhanced statutory rights are commonplace and wholly consistent with the separation of powers doctrine. In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), for example, a plurality of the Court held that a voting practice's discriminatory effect, standing alone, does not violate the Equal Protection Clause. *Id.* at 65-80 (opinion of Stewart, J.). In response to *Bolden*'s delineation of the scope of the Equal Protection Clause, Congress amended the Voting Rights Act, Pub. L. No. 97-205, 96 Stat. 131, to "make clear that a violation could be proved by showing discriminatory effect alone" and expressly reestablished as a

matter of statutory law the legal standard employed by this Court in earlier equal protection cases, such as *White* v. *Regester*, 412 U.S. 755 (1973). See *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); see also *Reno* v. *Bossier Parish Sch. Bd.*, 117 S. Ct. 1491, 1499-1500 (1997). Acknowledging that Congress's action "was largely a response to this Court's plurality opinion in [*Bolden*]," the Court has enforced that statutory right for nearly 15 years without voicing any separation of powers concerns. *Gingles*, 478 U.S. at 35; see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.).

Likewise, in *Washington* v. *Davis*, 456 U.S. 229 (1976), this Court held that only intentional discrimination in public employment violates the Equal Protection Clause. *Id.* at 238-248. Congress has nevertheless imposed upon governmental employers, through Title VII, the discriminatory impact test that this Court rejected as a constitutional matter in *Davis*. See *Connecticut* v. *Teal*, 457 U.S. 440, 445-456 (1982); see also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 & n.9 (1976).[12]

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[12] See also *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980) (upholding statutory prohibition on voting practices with discriminatory effects and requirement of heightened scrutiny through preclearance process, despite ruling that same day that only intentional discrimination violates Fifteenth Amendment); Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (legislative response to *Geduldig* v. *Aiello*, 417 U.S. 484 (1974)); 10 U.S.C. 774 (in response to *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), legislation increasing protection for religious objections to military uniform restrictions); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 18 n.8 (1989) (noting that Congress could enact legislation giving members of the military broad rights to wear religious head coverings in response to *Goldman*); 42 U.S.C. 2000aa (1994 & Supp. II 1996) (in response

Petitioner's separation of powers argument proceeds from the mistaken assumption that, in *Smith*, this Court articulated not just a constitutional floor on how little, but also a ceiling on how much, government can accommodate religion. Quite the opposite, *Smith* expressly anticipated a legislative response to its decision:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. *Flores* and *Smith* thus unquestionably permit States to protect religious liberty more than the Constitution requires, whether through retaining the *Sherbert*/RFRA standard in their own constitutions or through separate legislation. It would be illogical to conclude that Congress cannot do the same within its own sphere. See *Flores*, 117 S. Ct. at 2171 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

c. Contrary to petitioner's contention (Pet. 18-26), RFRA fully comports with the Establishment

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to *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), legislation immunizing the press from certain searches).

Clause. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). Rather, government may "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Whatever the outer limits of permissible accommodation, this Court's precedents demonstrate that the lifting of substantial, governmentally imposed burdens on religion in a sectarian-neutral manner does not run afoul of the Establishment Clause. Petitioner's argument, by contrast, would require the invalidation of every state constitution and law that, like RFRA, imposes heightened protection for the exercise of religion beyond the *Smith* floor, without providing equivalent protection for non-religious beliefs.[13]

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[13] Numerous States employ essentially the same test as RFRA to protect religious exercise under their own constitutions and laws. See R.I. Gen. Laws § 42-80.1-3(b) (1993); *State* v. *Miller*, 549 N.W.2d 235, 241 (Wis. 1996); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-281 (Alaska), cert. denied, 513 U.S. 979 (1994); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994); *Hunt* v. *Hunt*, 648 A.2d 843, 853-854 (Vt. 1994); *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 185-187 (Wash. 1992); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-66 (Me. 1992) (applying compelling interest test to analyze claim under state constitution); *St. John's Lutheran Church* v. *State Compensation Ins. Fund*, 830 P.2d 1271, 1277 (Mont. 1992) (applying compelling interest test without discussing *Smith*); *State* v. *Hershberger*, 462 N.W.2d 393, 396-398 (Minn. 1990); *State* v. *Evans*, 796 P.2d 178, 179-180 (Kan. Ct. App. 1990) (applying compelling interest test without discussing *Smith*); *In re Brown*, 478 So. 2d 1033, 1039 & n.5 (Miss. 1985);

RFRA has a secular legislative purpose. The alleviation of significant governmental interference with religious exercise is a permissible secular purpose, as long as Congress does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987). Congress's purpose in enacting RFRA was to advance uniformly the civil rights of all religious adherents; Congress played no favorites. Cf. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 702-707 (1994). Furthermore, by limiting RFRA to instances in which federal laws "substantially burden" religious exercise, 42 U.S.C. 2000bb-1, Congress acted only "to alleviate significant governmental interference" with religious autonomy and exercise. *Amos*, 483 U.S. at 335; cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.). Under those circumstances, the Establishment Clause does not "require that the exemption come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. In any event, as we have noted (see pp. 2-3, *supra*), the 1998 Donation Act, which now controls this case, applies to transfers to all qualified recipient religious or charitable entities.

RFRA also has a permissible primary effect. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under

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Porth v. *Roman Catholic Diocese*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995); cf. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (state constitutional protection of religion is "substantially stronger" than federal constitutional protection), cert. denied, 424 U.S. 954 (1976).

Lemon [v. *Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Thus, exemptions from generally applicable statutes often do not constitute impermissible governmental facilitation of religion, because the government neither adds to nor subsidizes the propagation of the religious message. *Ibid.*

As in *Amos*, nothing in RFRA results in the direct advancement or subsidization of religion. RFRA requires only that, under specified circumstances, the federal government must leave religion to operate in its own sphere by exempting persons from generally applicable obligations that substantially burden their religious exercise. See *Kiryas Joel*, 512 U.S. at 706 (permissible accommodations "have allowed religious communities and institutions to pursue their own interests free from governmental interference"). Under RFRA, religious practitioners will not be any better off than before coming into contact with the federal government; they will simply be less worse off because of the interaction.

Finally, RFRA does not impermissibly entangle the religious and the secular. Religious exemptions, as a whole, decrease governmental involvement with religion. *Amos*, 483 U.S. at 339. Like the provision of Title VII at issue in *Amos*, RFRA "effectuates a more complete separation of" government and religious practitioners and avoids the "intrusive inquiry" into religious doctrine and practices entailed by

efforts to regulate religious conduct. *Amos*, 483 U.S. at 339.[14]

Petitioner errs in her contention (Pet. 22-23) that RFRA fosters excessive entanglement by mandating an inquiry into whether government action imposes a substantial burden upon an individual's exercise of religion. Courts clearly possess the institutional competence and constitutional ability to administer RFRA's test. Even apart from RFRA, the substantial burden/compelling interest test continues to govern hybrid constitutional claims and First Amendment cases where government either intentionally targets religion or provides for individualized consideration of claims in its statutory scheme. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 881-885. Courts also must inquire into the existence of a substantial or "significant" burden on religious exercise when deciding whether religious accommodations comport with the Establishment Clause. *E.g.*, *Texas Monthly*, 489 U.S. at 15 (opinion of Brennan, J.). In addition, such inquiries are commonplace under state constitutions and statutes that offer more

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[14] In the bankruptcy context, for example, exempting tithes from the trustee's avoidance powers prevents churches from becoming routinely entangled in bankruptcy proceedings. Without such an exemption, churches that receive tithes will face demands for return of such contributions, become parties to litigation, face discovery of church records, and be forced to undergo evaluation of church assets for the collection of judgments. In addition, in many cases the courts may have to evaluate church doctrine and practices to determine if a contribution was made "in exchange for" services within the meaning of the Bankruptcy Code. See Pet. App. A88-A89 (discussing such a case). RFRA avoids those entanglements.

protection for religious liberty than *Smith*. See note 13, *supra*.[15]

4. Petitioner also seeks this Court's review of the merits of the court of appeals' interpretation and application of RFRA's terms. Pet. 27-30. The United States has intervened in this litigation solely to defend the constitutionality of RFRA. We thus do not address that argument other than noting, again, that the Donation Act renders those issues of no enduring relevance to the parties or to similarly situated litigants.

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[15] Petitioner also contends (Pet. 24-25) that RFRA violates the Establishment Clause as applied in this case. That claim does not merit review. First, there is no circuit conflict on that question. Second, the Donation Act both ensures that no conflict will arise and disposes of petitioner's arguments by requiring that non-religious, charitable donations also be exempted from avoidance. Third, if granting the particular relief requested would violate the Establishment Clause, that would constitute a compelling interest justifying the trustee's refusal to accommodate. See *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981). Thus, RFRA by its own terms does not authorize any relief that is constitutionally proscribed, and petitioner's argument—even if correct—would render RFRA inapplicable, rather than unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-1744

In The

Supreme Court of the United States

October Term, 1997

IN RE: BRUCE YOUNG AND NANCY YOUNG,

Debtors.

JULIA A. CHRISTIANS, TRUSTEE,

Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REASONS FOR GRANTING THE WRIT

For their primary argument in opposition to the Trustee's petition for a writ of certiorari, Respondent Church and Intervenor United States assert that a new statute – the Religious Liberty and Charitable Donation Protection Act of 1998 – would require this Supreme Court "inevitably [to] affirm under [the new statute] without reaching any of the issues set out in the petition. . . . " Respondent Church's Brief In Opposition To Petition For Writ Of Certiorari, at 3-4; *see also* Brief For The United States In Opposition, at 8-10. Therefore, the Church and United States conclude, this Court should use the new statute to deny the petition for a writ of certiorari.

The Church and United States are wrong for two reasons.

I. BECAUSE THE COURT OF APPEALS HAS REPUDIATED THE AUTHORITY OF THIS COURT AND HAS REJECTED CONSTITUTIONAL PRINCIPLES OF EXCEPTIONAL IMPORTANCE, THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS AND REMAND THE CASE FOR FURTHER CONSIDERATION IN LIGHT OF THE NEW STATUTE.

The decision of the court of appeals is such an overt repudiation of the authority of the Supreme Court, that the decision must not be allowed to stand. By its Order dated June 27, 1997, this Court vacated the earlier judgment of the court of appeals concerning the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb1-4

(1992), and remanded the case to the court of appeals for further consideration in light of *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Far from obeying *Flores*, however, the court of appeals chose to issue a ruling that is directly contrary to the express holding of *Flores*.

Flores expressly held that "RFRA contradicts vital principles necessary to maintain separation of powers. . . . " *Id.* at 2172. RFRA did so because it was "legislation which alters the meaning of the Free Exercise Clause." *Id.* at 2164; *see also id.* at 2170 (RFRA "attempted a substantive change in constitutional protections"). As an imposition of the Legislature's interpretation of the Constitution on the Judicial Branch, RFRA breached the fundamental principle that it is "the province of the Judicial Branch . . . to say what the law is." *Flores*, 117 S. Ct. 2172 (citing *Marbury v. Madison*, 1 Cranch, at 177); *see also Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) ("It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.") (citations omitted); *United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring) (the Supreme Court is "the branch whose distinctive duty it is to declare 'what the law is' ").

Unless the historic principle of *Marbury v. Madison* is now to be eroded, the Legislative Branch is precluded from imposing its interpretation of the Constitution upon the Judicial Branch not merely insofar as the Constitution applies to State law, but insofar as the Constitution applies to all law. Certainly nothing in *Flores* indicates that the province of the Judicial Branch has been limited to declaring the meaning of the Constitution concerning State, but not Federal, law.

Thus when this Court expressly held in *Flores*, 117 S. Ct. at 2172, that RFRA "contradicts vital principles necessary to maintain separation of powers," this Court could not have meant that RFRA's imposition upon the Judicial Branch of the Legislative Branch's interpretation of the Constitution was unacceptable as to State law but acceptable as to Federal law. Rather, in holding true to the principle that it is the province of the Judicial Branch to say what the law is, this Court could only have meant that RFRA's attempted usurpation of this Court's responsibility to interpret the Constitution was invalid as to all law, Federal as well as State.

Yet, in pure repudiation of this Court's express holding that RFRA "contradicts vital principles necessary to maintain separation of powers," *id.*, the court of appeals on remand in the case at bar held that RFRA does not contradict separation of powers concerning Federal law. *See* Appendix at A9-A14. This holding of the court of appeals must be reversed for two reasons of exceptional importance.

First, the court of appeals has circumscribed the holding of *Flores*, despite the fact that this Court expressly instructed the court of appeals to reconsider the case at bar in light of *Flores*. Such a repudiation of the authority of this Court cannot be allowed to stand.

Second, the holding of the court of appeals, that Congress may dictate to the Courts the meaning of the Constitution where Federal law is concerned, marks a dangerous turn away from the principle of separation of powers. Having only recently preserved the separation of powers in *Flores*, despite the array of special interests

behind RFRA, this Court must act in the case at bar to protect the separation of powers from destruction by lower courts who would sacrifice the Constitutional framework of our government in order to embrace the expedient solution that RFRA offers to those who find fault with the Supreme Court's interpretation of the Constitution.

Accordingly, regardless of the impact of the Religious Liberty and Charitable Donation Protection Act of 1998 upon the ultimate resolution of the case at bar, this Court should grant the requested writ of certiorari, summarily reverse the decision of the court of appeals concerning RFRA,[1] and remand the case to the court of appeals for further consideration in light of the Religious Liberty and Charitable Donation Protection Act of 1998. *See, e.g., Rhodes v. Stewart,* 488 U.S. 1 (1988) (summarily reversing where a court of appeals misapprehended controlling Supreme Court precedent); *see also* Robert Stern, Eugene Gressman, Stephen Shapiro, Kenneth Geller, *Supreme Court Practice* § 4.5 at p. 174 (7th ed. 1993).

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[1] Although the United States observes in its Brief in Opposition, at 10, that this Court should avoid questions of constitutionality unless such adjudication is unavoidable, this Court already has decisively ruled in *Flores* on the issue of RFRA's constitutionality.

II. IF THE ENACTMENT OF THE NEW STATUTE CAUSED THIS COURT NOT TO REACH THE ISSUES CONCERNING RFRA, THIS COURT SHOULD AT THE VERY LEAST VACATE THE JUDGMENT OF THE COURT OF APPEALS AND REMAND FOR FURTHER PROCEEDINGS IN LIGHT OF THE NEW STATUTE.

Based upon the recent enactment of the Religious Liberty and Charitable Donation Protection Act of 1998, the Church and United States assert that this Court should use the new statute to deny the petition for a writ of certiorari, **without ever affording the Trustee an opportunity in the lower courts to attack the new statute as unconstitutional.** Such a denial of Due Process clearly would be wrong. Consistent with Due Process, this case cannot be decided against the Trustee on the basis of the new statute until the Trustee has had the opportunity to challenge the constitutionality of the new statute. Therefore, if the enactment of the new statute causes this Court not to grant certiorari to decide the RFRA-related issues raised in the petition, this Court must vacate the decision of the court of appeals and remand for further consideration in light of the new statute. *See Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412 (1972).

In *Diffenderfer,* the plaintiffs sought a ruling that a Florida statute violated the First Amendment insofar as it authorized a tax exemption for church property used as a commercial parking lot. *Id.* at 412-13. After this Court had noted probable jurisdiction of the plaintiffs' appeal, the Florida Legislature repealed the statute at issue and enacted new legislation which provided, in relevant part, that church property was exempt from taxation only if

the property was used predominantly for religious purposes and only to the extent of the ratio that such predominant use bears to the non-exempt use. *Id.* at 413-14.

Because "the only relief sought in the complaint was a declaratory judgment that the now repealed [Florida statute] is unconstitutional . . . and an injunction against its application," this Court stated that the relief sought was "inappropriate now that the statute has been repealed." *Id.* at 414-15.

Although this Court in *Diffenderfer* thus ruled that the newly enacted legislation had rendered the case moot, this Court did not remand the case for dismissal. Instead, this Court held that "[b]ecause it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation, . . . we vacate the judgment of the District Court and remand the case to the District Court. . . . . *Id.* at 415; *see also United States Department of Justice v. Provenzano,* 469 U.S. 14 (1984) (where amendment to statute rendered moot the issue before the Supreme Court, the judgments of the lower courts were vacated and the cases were remanded to the courts of appeals for such further proceedings as were indicated).

Analogously to the Florida statute in *Diffenderfer,* Bankruptcy Code § 548, which is the basis of the Trustee's action against the Church in the present case, has now been amended by the Religious Liberty and Charitable Donation Protection Act of 1998. Under the amended § 548, the relief sought by the Trustee would not be appropriate (if the amendment survives scrutiny). Hence

the Religious Liberty and Charitable Donation Protection Act of 1998 moots the case.

As in *Diffenderfer,* this Court must not simply let the case terminate on grounds that the new statute moots this case. Rather, this Court must either vacate, or reverse,[2] the decision of the court of appeals, and remand the case to allow the Trustee to attack the newly enacted Religious Liberty and Charitable Donation Protection Act of 1998 and to demonstrate that former Bankruptcy Code § 548 retains some continuing force.

In the case at bar, the Trustee may well wish, on remand, to attack the Religious Liberty and Charitable Donation Protection Act of 1998 as an unconstitutional violation of the Establishment Clause. Such an attack would have merit, because the purpose of the Act is the non-secular purpose of promoting, in its sponsor's words, "the laws of God." 144 CONG. REC. S4770 (daily ed. May 13, 1998) (statement of Senator Grassley).

Under the rule of *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), a statute violates the Establishment Clause if it has a non-secular purpose. The purpose of a statute is determined not merely from its text. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). Rather, this

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[2] For the reasons set forth above in section I of this Reply, this Court may wisely choose not simply to vacate, but to reverse, the decision of the court of appeals before remanding the case.

Court looks to the underlying record to determine the legislature's true purpose. *Id.* at 534-35.

The legislative record concerning the Religious Liberty and Charitable Donation Protection Act of 1998 demonstrates that, although the Act may be facially neutral, its true purpose is to protect churches and the "laws of God" from the requirements that the Bankruptcy Code applies to all others. Senator Grassley, the Act's sponsor, stated:

> Mr. President, I would like to close on this note. When I chaired a hearing on tithing and bankruptcy before my subcommittee late last year, I heard from the pastor of Crystal Free Evangelical Church [sic]. This church is the one fighting right now in the Eighth Circuit Court of Appeals to keep the bankruptcy court out of its church coffers. Pastor Goold testified in a very compelling way about the practical difficulties his church has faced because of the Bankruptcy Code. As Pastor Goold put it, when there's a conflict between the bankruptcy laws and the laws of God, we should change the bankruptcy laws because God's laws aren't going to change.

144 CONG. REC. S4770 (daily ed. May 13, 1998) (statement of Senator Grassley).

Although the Religious Liberty and Charitable Donation Protection Act of 1998 may be facially neutral because it exempts both churches and secular charities from certain parts of the Bankruptcy Code, Senator Grassley makes clear that secular charities were included in the Act merely to create a shield of compliance with the requirement of facial neutrality:

> Mr. President, I think it's important to remember that my bill protects donations to churches as well as other types of nonprofit charities. I did this because many well-respected constitutional scholars believe that protecting only religiously-motivated donations from the reach of the Bankruptcy Code would violate the establishment clause of the first amendment.

144 CONG. REC. S4770 (daily ed. May 13, 1998) (statement of Senator Grassley).

Thus, before this case is decided on the basis of the Religious Liberty and Charitable Donation Protection Act of 1998, the Trustee must be given the opportunity to challenge the Constitutionality of that Act. Accordingly, if this Court believes that the issues in the petition for certiorari should not now be decided because of the new Act, then this Court must vacate the judgment of the court of appeals and remand the case for further proceedings.[3]

CONCLUSION

The decision of the court of appeals repudiates the holding of this Court that RFRA violates the separation of powers. To uphold its authority and to uphold the vital principle of separation of powers, this Court should grant

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[3] The other arguments in the briefs of the Church and the United States are, to the extent they are relevant, addressed in the Trustee's Petition For Writ Of Certiorari, the opinion of the district court (A72-A103), or the opinion of the bankruptcy court (A104-A128).

the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, summarily reverse the decision of the court of appeals, and remand the case for further proceedings in light of the Religious Liberty and Charitable Donation Protection Act of 1998.

In the alternative, this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings in light of the Religious Liberty and Charitable Donation Protection Act of 1998.

Respectfully submitted,

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